REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURT OF THE UNITED STATES

FOR THE

DISTRICTS OF CALIFORNIA.

CUTLER McALLISTER,

REPORTER.

VOLUME I.

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CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICTS OF CALIFORNIA.

From the Organization of the Court, March 2, 1855, to April 23, 1856,

HON. M. HALL McALLISTER,
JUDGE.

From April 23, 1856,

HON. M. HALL McALLISTER,
CIRCUIT JUDGE.

HON. OGDEN HOFFMAN,
DISTRICT JUDGE.

TABLE OF CASES REPORTED.

ERRATA.

PAGE 30, LINE 16, insert "and" before the word "as."
" 77, " 4, omit the word "He" and substitute "The party illegally deprived of his liberty."
" 145, " 24, after 1858, add the words "by the plaintiffs."
" 201, " 19, read "give" in lieu of "gives."
" 201, to end of last line, add the words "the civil law terms it, the."
" 254, LINE 12, for personalty read "realty."
" 272, " 11, instead of "2,500,000," read "25,000,000."
" 417, " 18, insert "to" in lieu of "in."

REPORTS OF CASES.

SEABURY *v.* FIELD AND OTHERS.

Circuit Court, U. S., July Term, 1855.

On the ratification of the Treaty of Guadalupe Hidalgo, property below low-water mark, in the Bay of San Francisco, passed from Mexico to the United States.

Intermediate the date of the Treaty and the admission of California into the Union, the title remained in the government of the United States.

During that period, no deed or transfer by any officer of this government, unauthorized by an act of congress, could alienate any portion of the public domain.

Such conveyance was a mere nullity.

On the admission of California into the Union, she became subrogated to the rights over the disputed premises which had been vested in the United States, subject only to any cession of them by that provision of the constitution which surrenders to the general government the power to regulate commerce with foreign nations, and among the several States, and with Indian tribes.

Although a void grant cannot be confirmed by subsequent acts between individuals, it is otherwise as to confirmation by statute.

Plaintiff cannot recover in ejectment, unless on a better title than defendants.

This is an action of ejectment instituted for the recovery of a lot of land forming a portion of property known as the "Beach and Water Lots," situate in front of the city of San Francisco, intermediate low-water mark and the ship-channel of the Bay, and between Rincon and Fort Montgomery Points.

The plea filed was a general denial, equivalent to a plea of not guilty at common law.

The facts of the case arose mainly out of the documentary title of the respective parties, and are set forth in the charge of the court to the jury, which was delivered by

McAllister, J.—The plaintiffs trace their title to one Thomas Sprague, to whom a grant to the lot in controversy was made on the 3d January, 1850, by John W. Geary, alcalde of the city of San Francisco. The power of said alcalde is predicated upon the proclamation of General Kearney, issued on the 10th of March, 1847, as military commander in California at the time. By that proclamation, the power to grant was assumed by virtue of alleged powers vested in him by the President of the United States. In the exercise of those powers, all the property known as the "Beach and Water Lots," was granted with certain reservations to the city of San Francisco.

The court instructs you, on this point, that the proclamation of General Kearney, and the grant under it, passed no greater interest in the property than it would have done if signed by a private, unofficial person.

During the period California was subject to the American arms, the military and municipal officers in the service of the United States government exercised their functions in subordination to it. Whatever may have been their powers during that anomalous condition of things, the power to grant was not one of them.

They could do no act to affect the rights of the government of the United States to the public property; rights to be determined in their extent and character by the issue of the pending contest.

On the ratification of the Treaty of Guadalupe Hidalgo, the rights political and proprietary over the property in dispute, passed from the government of Mexico, where it had been, to that of the United States.

There was no officer in the service of the government who could for any purpose, or at any period, make a valid alienation to any person, natural or artificial, of any portion of the public property in land.

The Constitution of the United States confides to congress the exclusive power of disposing, and making all needful rules and regulations respecting the public property of the government.

No interest, therefore, having passed under the proclamation of General Kearney to the city of San Francisco, it could transmit none to Sprague, by means of the grant made by their alcalde, Geary. As title, it gives no standing in this court to the plaintiffs. How far the documents they have produced in evidence may be available to them, considered in another aspect of this case, will be brought to your consideration hereafter.

The documentary title of the defendants next claims attention. They claim under a grant from Alcalde Leavenworth, under date of 28th September, 1848. This title is as invalid as the one under which the plaintiffs claim.

No interest proprietary or political over the property in the Bay of San Francisco, below low-water mark, was vested in the *pueblo* of San Francisco, under the Mexican government; if it be admitted that such *pueblo* ever had an organized existence. No such interest having ever vested in the Mexican *ayuntamiento*, none such could have been transferred to its successor, the American town council. But if it be admitted that the power did exist in the former to grant this water prop-

erty, it by no means follows that such power, the delegation of sovereignty from the Mexican government, survived after the sovereignty of which it had formed a part, had ceased to exist. No officer, Mexican or American, could exercise the granting power over public property of the United States. Nothing but an act of congress could authorize the exercise of such power.

The court, therefore, charges you, that the two grants under which the parties in this case respectively claim, are mere nullities, neither of which conveyed a valid title to the land it assumed to transfer. Thus far, as to documentary title, the parties stand on an equal footing.

It becomes necessary now, that you fix the attitude of the parties as it is ascertained by the evidence in this case as to the possession of the premises in dispute at the time of the passing of the act of the legislature of this State, on the 26th March, 1851, the origin of the title of both parties, as also, at the date of the commencement of this suit. The witnesses are few in number, and the facts to which they testify are not complicated. It is your especial province to decide on them, limited in your inquiries only by the boundaries of truth.

Having fixed in your minds the position of the respective parties at the date of the said act of the legislature, known as the "Beach and Water-Lot Bill," it becomes the duty of the court to instruct you as to the legal effect of that act upon the rights of the parties. They both claim under this act. What was the interest of this State in the property in dispute at the time it was passed, is the first question. Reference has been made to the case of *Pollard's Lessee*, as settling the question of ownership by this State in the said property by her annexation to the Union. The court does not consider that case as directly deciding the point, inasmuch as the decision turned to

some extent on the fiduciary character imposed on the government of the United States, under the cession made to them in 1802, by the State of Georgia. But in view of the general reasoning, in that case, of the constitution of this State, embodying her boundaries, and the terms of the act of congress admitting her into the Union, the court instructs you that this State, on her accession to this Confederacy, became subrogated to all the rights, political and territorial, in this water-property, which had been theretofore in the United States government after the Treaty of Guadalupe Hidalgo. Those rights were consequently in this State at the time of the passing of the act of the legislature under consideration. It is intitled, "An Act to provide for the disposition of certain property of the State of California." (Comp. Laws, 764.) By its second section, the use and occupation of the property is granted to the city of San Francisco, for the term of ninety-nine years from its date, except all the lands being a portion of said property, which had been "sold by the authority of the *ayuntamiento*, town or city council, or any alcalde of the said town or city, or by any alcalde of the said town or city at public auction, in accordance with the terms of the grant known as 'Kearney's grant to the city of San Francisco,' and confirmed by the *ayuntamiento*—town or city council—thereof, and also registered and recorded in some book of record now in the office, custody, or control of the recorder of the county of San Francisco, on or before the 3d day of April, 1850." All such lands as had been sold in the manner described, were granted to the respective purchasers thereof for the term of ninety-nine years. It is contended that this act is a confirmation of the grants under which the parties claim. The court does not so consider. Those profess to convey a fee; the act of the legislature transfers a chattel-interest, a term of years only; an estate differing

in quantity and degree from that in the grants. It cannot be deemed the confirmation of a pre-existing estate, but the creation of a new one. The court considers this act a legislative grant of land for a term of years, and the reference therein made to lands which had been purchased and held under the prescribed form, as a *designatio personarum*, to designate the classes of persons who were to take as grantees. The inquiry is, do the parties, or either, or both of them, belong to the class of grantees designated by the statute? Both claim to be so comprehended. On this point, the court instructs you that if you are satisfied from the evidence that the plaintiffs are purchasers of the lot in controversy, comprehended within the boundaries mentioned in said act, which lot was sold at public auction by the authority of the town-council of San Francisco, in accordance with the terms of the grant known as Kearney's grant to the city of San Francisco, then, in such case, the plaintiffs are to be deemed as comprehended within one of the classes of grantees designated by the statute. And the court further instructs you, that, if you are satisfied from the evidence that the defendants hold the lot in controversy as purchasers under the grant of an alcalde of the city of San Francisco, which was confirmed by an *ayuntamiento*, or town or city council thereof, and also registered and recorded in some book or record in the office, custody, or control of the recorder of the county of San Francisco, on the 20th day of March, 1851, and which registry or record was made on or before the 3d day of April, 1850, then, in such case, the court instructs you that the defendants are also among those designated as the other class of grantees under said act. The mode and manner in which the confirmation of the town-council is to be given; are not prescribed, and any form in which it may have been given, if it satisfies you of the fact, will be sufficient in this

case. Should you be satisfied from the evidence of the authority or confirmation of the *ayuntamiento*, or town-council, to both the grants under which the parties respectively claim, then the court instructs you that the parties stand in *equali jure*, as to documentary title, and their rights must be adjusted by the parol testimony and the principles of law applicable to the facts elicited. These will be found in the instructions prayed for by the respective counsel, which the court will now give.

The plaintiffs' counsel ask me to instruct you,—

1st. If the jury believe that the lot in controversy was sold to Sprague, by Alcalde Geary, at public auction, in accordance with the terms of the grant known as "Kearney's Grant" to the city of San Francisco, then the second section of the act of the California Legislature, approved 26 March, 1851, operates as a valid grant of the same lot, for the space of 99 years from the date thereof, to the said Sprague.

2d. No title passed to Parker by the grant from Leavenworth; of the 25th September, 1848.

The court has given you, and now reiterates the principles embodied in the foregoing instructions.

The counsel for defendants have asked the following instructions, which I give you.

1st. Although a void grant cannot be confirmed by a subsequent act between individuals, yet it is otherwise as to confirmation by statute, and the legislature may, by statute, confirm a deed or grant which was absolutely void at the time of confirmation.

The court gives this instruction with the addition,—so that vested rights of third persons are not divested.

2d. The lot in question being covered with tide-water, vested in the State of California, upon the admission of the State into the Union.

3d. The State having thus been the owner of the property in question, it was competent for the State to dispose of it by statute operating as a conveyance.

4th. The act of March 20, 1851, operated as a legislative grant in the cases therein specified, and if the lot in question was sold or granted on the 25th September, 1848, by Leavenworth, as Alcalde of San Francisco, and afterwards confirmed by the *ayuntamiento*, or town or city council, and registered on or before the 3d day of April, 1850, in some book of record in the office, custody, or control of the recorder of the county of San Francisco, at the date of the passage of the act, the said statute operated as a grant of the said lot to the said Parker, his heirs and assigns, and any person holding under him or them, for the term of ninety-nine years from the date of the act.

5th. In case of equal rights, or equities, the maxim, *prior in tempore, potior in jure*, will prevail.

6th. In ejectment, the plaintiff cannot recover without showing a better title than the defendants; and unless the plaintiffs have shown in themselves a better title, the verdict must be for the defendants.

The plaintiffs must recover on their legal title, as distinguished from the equitable title of the defendants.

Verdict for plaintiffs.

Holliday & Saunders, for plaintiffs.
Lockwood, Tyler & Wallace, for defendants.

VANDEWATER *v.* THE STEAMSHIP "YANKEE BLADE."—*In Admiralty.*

Circuit Court, U. S., July Term, 1855.

Maritime liens will not be extended by implication.

Where a contract is maritime, if there is no lien annexed to it by law, it cannot be enforced in admiralty by proceedings *in rem*.

An agreement by owners for the future employment of their vessels, resembles more a consortship than a charter-party, and to it no lien is fixed by implication of law.

A libel *in rem* was exhibited in the court below, claiming damages for the violation of an agreement, entered into at New York, on the 24th day of September, 1853, in the following words:—

"This agreement, made this twenty-fourth day of September, 1853, at the city of New York, between Edward Mills, as agent for the owners of steamship 'Uncle Sam,' and William H. Brown, as agent for the owners of steamship 'America,' witnesseth, that said Mills and Brown hereby agree with each, as agents for the owners of said ships before named, to run the two ships in connection for one voyage, on terms as follows, viz.: Of all moneys received from passengers, and for freight contracted through and between New York and San Francisco, both ways, the 'Uncle Sam' shall receive seventy-five per cent. and the 'America' shall receive twenty-five per cent.; the money to be received here by said E. Mills, and the share of the 'America' to be paid over to William H. Brown, or his order, before the sailing of the ship; and the share due the 'America' of moneys received on the Pacific side, to be paid

over to said Brown, or his order, immediately on the arrival of the passengers in New York, by E. Mills, who guarantees, as agent aforesaid, the true and honest returns of all funds received by his agents on the Pacific. It is understood that this trip is to be made by the 'Uncle Sam' leaving San Francisco on or about the 15th October, and the 'America' New York on or about the 20th October next. Each ship is to pay all the expenses of her running and outfits, and to be responsible for her own acts in every respect. Each ship is to retain all the moneys received for local freight or passengers, that is, for such freight and passengers as only pay to the ports the individual ship runs to, without any division with the other ship. No commissions are to be charged anywhere on any receipts for the 'America' by said Mills in division; but the expense of advertising, and the amount paid out for runners at all points are to be borne by each ship in the same proportion as receipts are divided between them.

"In consideration of all the above, well and truly performed in good faith, Edward Mills, as agent for the steamship 'Yankee Blade,' hereby agrees that when the 'America' arrives at Panama, on her voyage hence to the Pacific Ocean, said ship 'Yankee Blade' shall leave New York at such time as to connect with the 'America,' conveying passengers and freight on the same terms as is hereinbefore agreed, say twenty-five per cent. to the 'Yankee Blade,' and seventy-five per cent. to the 'America;' provided only that said connection shall be made at a time that will not prevent the 'Yankee Blade' from making her connection with the 'Uncle Sam' at her regular time.

"E. Mills,

"W. H. Brown."

To the libel exceptions were taken in the court below, which being sustained, the libel was dismissed, and an appeal taken to this court.

McAllister, J.—This case comes before the court on an appeal from the decree of the District Court of the United States for the Northern District of California, dismissing the libel upon exceptions taken to it. To the exception taken to the jurisdiction of the court, this inquiry will be limited.

For the past half-century, the extent of the admiralty jurisdiction of the courts of this country has been a fruitful source of controversy; and, though illumined as it has been by the genius of some of our ablest jurists, still remains a vexed question. In 1847, in *Waring* v. *Clarke*, 5 Howard, 441, the Supreme Court decided that in cases where admiralty jurisdiction depends on locality, it extends to all torts committed on the high seas, or within the ebb and flow of the tide as far up a river as the tide ebbs and flows, although the place be *infra comitatus*. Thus much for the jurisdiction of admiralty over *torts*.

In the same year, in the case of *The New Jersey Navigation Co.* v. *The Merchant's Bank*, 6 Howard, 344, that court decided that the courts of the United States had admiralty jurisdiction *in personam* and *in rem* over libels founded on contracts of affreightment to be executed on the sea, between the cities of New York and Providence. In 1849, in *Cutler* v. *Rae*, 7 Howard, 729, they declined to entertain a like jurisdiction in a cause of contribution, or general average, civil and maritime, and they say, "It is very much to be regretted that the jurisdiction of the courts of admiralty, in this country, is not more clearly defined. It has been repeatedly decided in this country, that its jurisdiction is not restricted to the sub-

jects over which the English courts of admiralty exercised jurisdiction at the time our constitution was adopted." It is not necessary, for the purposes of this case, to enter the field of extended discussion into which our inquiry into the extent of admiralty jurisdiction over contracts would lead. If that jurisdiction be admitted to the extent contended for by its most zealous advocate, this case cannot come within its reach.

Some twenty years after his elaborate exposition of the doctrine in the case of *De Lovio* v. *Boit*, Judge Story re-asserted it in the case of *The Volunteer*, 1 Sumner, 551. The principle enunciated is, to use his own language (p. 553), "that the Admiralty had an original, ancient, and rightful jurisdiction over all maritime contracts strictly so called (that is, such contracts as respect business, trade, and navigation to, on, and over the high seas), which it might exert by a proceeding *in rem* in all cases where the maritime law establishes a lien or other right *in rem*, and by a proceeding *in personam* where no such lien or other right *in rem* existed." It follows from this, *first*, that all maritime contracts are within the jurisdiction of the admiralty courts; *second*, that there are only some of these contracts for the violation of which the admiralty jurisdiction can be exercised *in rem;* and, *third*, that those are such contracts to which the maritime law has annexed a lien. Admitting the contract sued on to be a maritime one, the inquiry is whether it belongs to that class of such contracts as have attached to them, by legal implication, a lien.

It is admitted by the proctor for libelant, that there is no case parallel in its details with the present; and this court is asked to extend the principles applicable to charter-parties, and make the lien which the law applies to those instruments, applicable to the case at bar. Before viewing the contract in its supposed analogy to a charter-party, let us consider it *per*

se. It is a contract made by owners of vessels in a home port. This circumstance is worthy of consideration. The question is not whether an instrument known to the maritime law, and to which it has annexed a lien, is to be divested of that lien by the fact that such instrument was made by the owner instead of the master of the ship. The point is, whether there should be an implied lien in a contract, such as the one under consideration, made by the owners in the home port. In the case of *The Draco*, 2 Sumner, 176, Judge Story, after deciding that a bottomry bond may be made by the owners of a vessel in a home or a foreign port, says, "Whether upon contracts so made in a home port a remedy lies in the Admiralty *in rem*, is quite a different question." When so great an advocate of admiralty jurisdiction doubts, we certainly should pause. Again, in *Blaine* v. *The Ship Carter*, 4 Cranch, 328, 331, the court say, "In the case of a bottomry bond, executed by the owner in his own place of residence, the same reason does not exist for giving an implied admiralty claim upon the bottom (of the ship); for it is in his power to execute an express transfer or mortgage." In view of foregoing reasoning, in relation to a marine instrument, well known to the laws of the sea, in deciding whether there is an implied lien annexed to the contract in dispute, and which is, *sui generis*, the fact, that there is no necessity for such implication, as it was in the power of the party to make an express hypothecation, is not to be overlooked. To create such lien it has been urged that the present contract is a charter-party, or if not, so analogous to it that the rule applicable to the one should be applied to the other.

A charter-party is the hiring of the whole or a part of a vessel, for the transportation of merchandise or passengers; and if it does not, *ex vi termini*, convey a proprietary interest, it certainly does pass a claim or interest in the vessel, recog-

nized by the maritime law, the privilege to look upon her as answerable for the goods placed on board. That she is answerable for them, and they to her, is a well-settled and universal rule of law; and the parties, when they enter into the contract, are presumed to do so with knowledge of the lien implied by law from the terms and character of the instrument they make. The present agreement is a personal one, between the owners of vessels, to embark them in a common enterprise and divide the profits in the mode agreed upon; and includes a personal guarantee of one of the owners for a true and honest return of the moneys received by his vessel. If such agreement be a charter-party, then must every agreement between owners, where their vessels are to be used in carrying it out, be so considered; and the law, where no express lien has been created, must imply one. In charter-parties there is a mutuality of lien. The ship is answerable to the goods, and these again to the ship. They are joined together by the act of the law, and cannot be separated, save by the act of the parties, without the discharge of the respective liens. Here is perfect mutuality. The court can perceive none such in this case. The agreement is simply one of association; its object, to make a direct route through from New York to San Francisco, for the transportation of merchandise and passengers, the owners designing to combine the capacity of their two vessels to keep open a direct, uninterrupted communication between the two *termini* of the contemplated voyage. The court has been unable to find any case decided by the Supreme Court of the United States which has adjudicated that implied liens are annexed by the maritime law to associations made by owners of different vessels for purposes of trade. The case of *Andrews* v. *Wall*, 3 Howard, 568, is the only case which refers to these associations between the owners of vessels. But the question

did not directly come before the court. Judge Story, *arguendo*, did say, "Over maritime contracts the Admiralty possesses a clear and established jurisdiction, capable of being enforced *in personam* as well as *in rem.*" As general as are the terms here used by Judge Story, this court considers them as simply affirming the admiralty jurisdiction *in personam* over all maritime contracts. But, as before stated, the question was not directly before the court. Conkling, in his treatise, says of the case of *Andrews* v. *Wall*, that it was not an original suit, but an intervention by third persons for their interest against funds in court. Had the enunciation, made by Judge Story, been understood in an unrestricted sense, and deemed the doctrine of the court, whence the expression of regret by the chief justice, four years later, "that it is very much to be regretted that the jurisdiction of the Courts of Admiralty in this country is not more clearly defined"? If the proposition advanced *arguendo* by Judge Story had been adopted by the court in its unrestricted sense, no clearer definition was needed. The jurisdiction of the Admiralty would extend over all maritime contracts whatever, either by a proceeding *in rem* or *in personam*. The only question as to jurisdiction, when the former proceeding was taken, would be whether the *res* or its proceeds were within the reach of the court. This court knows no adjudication of the Supreme Court which has carried the doctrine to that extent, and it feels indisposed to adopt it in advance. The instrument sued on was made by the owners of the ships in the home port; there is no express hypothecation; there is no necessity for annexing to it an implied one; it is an instrument unknown to the maritime law; there is nothing in the transaction to raise an inference that the credit was not exclusively personal; and there is no decision of the Supreme Court affixing an implied

lien to such a contract. The agreement, as has been said, is simply an association for the purposes of trade. In relation to an agreement of consortship, Mr. Conkling, in his treatise on Admiralty Jurisdiction, says, "There seem to be sufficient reasons for holding that no mutual liens arise from a contract of consortship, and, therefore, no suit *in rem* can be maintained for their enforcement." (Vol. ii. p. 517, 2d ed.) Bene dict states, "that vessels engaged in maritime employment, in which association increases efficiency or security, often agree to make common cause in their enterprise. Such agreements are agreements for consortship. They are maritime contracts, and are within the acknowledged jurisdiction of the Admiralty of this country." (§ 298.) But he does not intimate that they are within that class of contracts referred to by Judge Story, in the case of the *Volunteer*, to which there is annexed a lien by the maritime law, which can be enforced by a proceeding *in rem*. The analogy between the contract sued on and an agreement for consortship is slight; but it appears to the court stronger than that which exists between the former and a charter-party. In this case, the owners of the ships could, had they so chosen, have created an express lien; the maritime law gives no implied one, and this court declines to construct one.

The exception to the jurisdiction is overruled, and the decree of the court below, dismissing the libel, is affirmed.

Janes, Doyle & Barber, for libelant.
Crockett & Page, for claimant.

Affirmed, *sub nom. Vandewater* v. *Mills*, 19 Howard, 82.

TEESE *et al. v.* PHELPS *et al.*

Circuit Court, U. S., July Term, 1855.

An allegation, in the complaint, of residence of the parties is not necessary to impart jurisdiction.

If a defendant is sued out of his district, he must plead his personal privilege.

The objections to the form of a complaint must be availed of by *special demurrer*.

This court has by rule adopted the forms of pleadings and practice in the courts of this State, as ascertained by its practice act, unless they contravene the acts of congress or the rules of this court.

Whether an invention is patentable is a mixed question of law and fact, and should not, in ordinary cases, be disposed of without the intervention of a jury, where the title has not been fixed at law.

This action is brought to recover damages for the alleged infringement of a patent. To the complaint a *general demurrer* has been filed.

McAllister, J.—The grounds assigned in argument are, first, that there is no allegation in the complaint that either plaintiffs or defendants are residents of any particular district. It is not indispensable to make such averment. If a party be sued out of his district, he can plead his personal privilege. In this case it is not alleged that the defendants are sued out of the district of which they are residents. The objection is, that there is no allegation in the complaint that the defendants are residents of the district in which they are sued. Such allegation is not necessary to give jurisdiction to the court, and it certainly constitutes no part of the plaintiff's cause of action. In *Gracie* v. *Palmer*, 8 Wheaton, 699, Chief Justice Marshall says, "That the uniform construction under said clause (the 11th sec. Jud. Act of 1789, ch. 20; 1 Stat. at Large, 78) had been, that

it was not necessary to aver on the record that the defendant was an inhabitant of the district, or found therein. That it was sufficient if the court appeared to have jurisdiction by the citizenship or alienage of the parties."

The second ground of *demurrer* goes to the form of complaint. It is admitted that this complaint is substantially an action on the case; but it is urged that it is not clothed in the technical form as known at common law. The defects alleged, being matters of form, cannot suspend the action of the court, inasmuch as they have not been made the ground of a *special demurrer*, as required by the Judiciary Act of 1789. But if a special demurrer had been filed, and the defect alleged, that the action was brought in a form different from that which accords with the common law, the objection would not have been available. The act of congress known as the Process Act, passed May 19, 1828, adopted the forms and modes of proceedings in the State courts in common-law cases, as controlling the practice of the courts of the United States, subject to such alterations and additions as the said courts of the United States shall in their discretion deem expedient, or to such regulations as the Supreme Court shall from time to time prescribe. In all the States except Louisiana, while actions at law are tried upon their merits by the application of common-law principles, the forms of pleading as they obtain in the State courts have been adopted in most of the courts of the United States. This court has, by a rule, adopted the forms of pleading and practice which obtain in the courts of this State, in all cases not provided for by the rules of this court or the acts of congress. Now, the complaint in this case cannot be deemed defective: though not technically correct, it is a substantial compliance with the mode of pleading prescribed by the practice act of this State, in conformity to which, as far as

practicable, it is the duty of this court to act. It is urged in support of the *demurrer*, that, as the act of congress of August 23, 1842 (Statutes, 517) gives full power to the Supreme Court of the United States to regulate from time to time the forms of writs and other process in the Circuit Courts, the preceding acts of congress are repealed. There is no repealing clause in the statute. Its only object is to give a supervisory power to the Supreme Court over the rules of subordinate courts. Under this act that tribunal has prescribed rules in admiralty and in equity; but has not thought expedient to prescribe rules in common-law cases; thus leaving the Circuit Courts to govern themselves by the modes of proceeding which obtain in the State courts, modified by their own rules. A practical illustration of this will be found in the case of *Christy* v. *Scott*, 14 Howard, 282.

The third ground of *demurrer* is, that the improvement for which the plaintiffs claim a patent, is neither an art, a manufacture, nor composition, and is therefore not patentable. Whether a given improvement is a patentable invention, is a mixed question of law and fact, and should not, in ordinary cases, be disposed of on *demurrer* and without the intervention of a jury. The last objection is, that the specification is too indefinite. The court does not so consider it, and if the jury should find it novel, cannot regard it of such indefinite character as to defeat the patent on that ground.

An order must be entered in this case that the *demurrer* be overruled, defendant paying costs.

C. H. S. Williams, for plaintiffs.

B. S. Brooks, for defendants.

DESSAU *v.* BOURS AND OTHERS.

Circuit Court, U. S., July Term, 1855.

PAROL testimony is inadmissible to charge a party on negotiable paper, where neither his name, nor any other circumstance, appears on its face to connect him with it.

The rule applicable in cases of sales, as to undisclosed principals, does not apply to this case.

Where there is sufficient on the face of negotiable paper to create a doubt to whom credit was given, parol evidence is admissible to remove that doubt.

An action was brought, by payee *v.* drawer, on following draft:

Banking House, T. Robinson, Bours & Co.,
Stockton, January 22d, 1855.

At sight pay to the order of A. Dessau, for value received, twelve hundred dollars.

To T. Robinson, Bours & Co.
William Hagan & Co., Agents.
New York.

An answer to the complaint was filed, which sets forth specially certain facts by way of defense, which will be found in the opinion of the court. To that answer a *demurrer* was filed by the plaintiff.

MCALLISTER, J.—On the face of this instrument, there can be no doubt of the responsibility of defendants. No mention is made of any principal; nor is any fact patent on the face of the paper which discloses the existence of any persons save the drawers who are to be charged. Thus viewed, by the well-settled rule of law, the word "agents" appended to the drawers, names are to be regarded merely as *descriptio person-*

arum, and the instrument fixes upon the signers an unqualified responsibility. The defense to the action rests upon an answer which avers that the bill was drawn by defendants as agents of certain persons named *Burgoyne & Co.;* that at the time it was drawn, such fact was communicated to the plaintiff, and he was informed, that the defendants were in no way liable for the due acceptance or payment of the bill; that, after being so informed, the plaintiff took the bill, and then and there agreed with defendants, that in case of non-acceptance or non-payment of same, defendants were not to be liable; but that he (the plaintiff) would look solely to the said *Burgoyne & Co.* for indemnity. To the answer, a *demurrer* has been filed by the plaintiff, and the question raised by the pleading is, whether parol testimony is admissible to discharge a party from the liability fixed upon him by law, by the terms of the bill under consideration. The names of *Burgoyne & Co.* do not appear on the bill, and if made liable, they are to be made so under the authority of that class of cases, relied on in this case, which authorizes the admission of parol testimony to fix the liability of an unknown principal. The rule which admits such testimony to charge an unknown principal, while it rejects such when its object is to discharge the signer of a written contract, is advanced by Mr. Smith, in his Leading Cases, and has been subsequently adopted in Westminster Hall. But the cases collated by that writer, and those which in England and this country affirm the principle, will be found to be cases of sales. The court considers none of these strictly applicable to the case at bar. There is a distinction between the admission of parol testimony to charge an unknown principal in a transaction of sale, and to fix the liability of a party upon a bill on which his name does not even inferrentially appear.

In a recent case in England, Lord Abinger, Ch. B., and Parke, Gurney, and Rolfe, BB., decided that a partner might be held upon a written contract signed by his co-partners, but on which his name did not appear; considering the case one of agency. While they state that all written contracts not under seal stand upon the same footing as contracts not written, they expressly admit, that in the case of a bill of exchange, or promissory note, none but the parties named in the instrument can be sued upon it. (*Beckham* v. *Drake*, 9 M. & W. 79, 92; 1 Parsons on Contracts, 48, n. *a*.)

In accordance with this doctrine is the case of *Pentz* v. *Stanton* (10 Wend. 271), relied on by counsel for the *demurrer*.

The force of this authority is assailed upon the ground, that in the marginal note of the reporter, as well as in the argument of counsel, it appears in that case, no disclosure of the name of the principal was made. Such is the fact; but it is equally true, that the court did not place its decision upon that ground; but on the broad principles of commercial law. It says, "the plaintiff cannot on the bill of exchange recover against the present defendant. His name nowhere appears upon it. It was drawn and subscribed by West, in his own name, with the simple addition of 'agent;' but without any specification whatever of the name of the principal." Again, "It is not sufficient to charge the principal, or protect the agent from personal liability, merely to describe himself as agent, if the language of the instrument imports a personal contract upon his part." It is urged that if *Burgoyne & Co.* are not liable, that fact fixes the liability of defendants. It does not follow from the circumstance that the former are not responsible on paper on which their names do not appear, that the liability of defendants must on that account be *conclusively* fixed. Their responsibility depends upon the admissi-

bility of certain evidence, which question is raised by the *demurrer* in this case; and if it be overruled, then upon the clear and satisfactory character of the evidence the defendants may give of the facts pleaded depends their liability. To sustain it, the counsel for the plaintiff has cited several cases from Massachusetts. In the first of these, the party signed the note sued on as "guardian of an insane person;" and in the second, as "guardian of an infant." In both, the principals disclosed were incapable of contracting, and the inference therefore was, that the only party who could contract was the one intended to be charged, and the addition to his signature was regarded merely as a *designatio personæ*, or intended to serve him in making up his accounts. The third case, was one where a party sued on a note made payable to him as agent; and it was held, he might sue in his own name. (5 Mass. 299; 6 Mass. 58; 8 Mass. 103.) Neither of these cases touches the point whether the parol testimony offered in this case can be received. The true rule deducible from the recent cases is, that where there is sufficient on the face of the instrument to create a doubt to whom the credit was given, then, as between the original parties, parol evidence is admissible to remove that doubt. In the application of this rule, the embarrassing question may arise, whether the form of an instrument in a given case is such as will admit parol evidence to remove the doubt suggested by its terms. In the case of *The Mechanics' Bank of Alexandria* v. *The Bank of Columbia* (5 Wheaton, 326), the check sued on was signed by William Patton, individually. The question was, Is this a private check, or drawn as cashier? The court say (p. 335), "Had the draft signed by Patton borne no marks of an official character on the face of it, the case would have presented more difficulty." They then advert to the fact that the check, which was in the usual form, had

prefixed to it the words "Mechanics' Bank of Alexandria," as sufficient to authorize the admission of parol testimony, to show the true nature of the transaction. It is to be observed, that such testimony was admitted to charge a party whose name did not appear upon the check. A further step in the relaxation of the rule was taken in the case of *The Susquehanna Bridge Co.* v. *Evans* (4 Wash. 480), where testimony was admitted in an action between indorser and indorsee, to establish a parol agreement between the parties entered into at the time of indorsement. The point under consideration came before the Supreme Court of New York in *Mott* v. *Hicks* (1 Cowen, 513). A note was given in the name of The President and Directors of the Woodstock Company, signed by W. Hicks, President, and made payable to Isaac Horsfield, who indorsed as agent. On trial of an action on the note, the endorser, Horsfield, was offered as a witness and objected to. The question of his liability, as endorser, came up directly. It was held, first, that the maker of the note was not individually liable there being sufficient on the face of the instrument to indicate the principal; second, that parol evidence was admissible to discharge the endorser, inasmuch as he had endorsed as "agent," which, it was considered, had opened the door to the admissibility of testimony. But the question has been met more directly in the case of *Hicks* v. *Hinde* (9 Barbour, 528). The action was upon a draft, signed by John Hinde, "Agent," and the court, after adverting to the case of *Pentz* v. *Stanton* (10 Wend. 271), and other cases, decided that the drawing of the draft was restrictive, and that the word "Agent," annexed to the signature of the maker was equivalent to a declaration that he would not be held responsible personally on the draft. In such case, parol evidence was admissible. These two last cases have been cited approvingly in New York, in *Babcock* v.

Beman (1 Kernan, 200), and may be taken as the law of the most commercial State in the Union. The rule is not only adopted, but carried to a greater extent in Pennsylvania. In *Miles* v. *O'Hara* (1 Serg. & Rawle, 32), the drawer of a bill of exchange was permitted to rebut the presumption of liability arising out of his unqualified and unrestricted signature; by introducing parol testimony to establish his agency, and the knowledge of it by the opposite party. A decision to the same effect will be found in *Hill* v. *Ely* (5 Serg. & Rawle, 363). But this court cannot go to the extent to which the courts of Pennsylvania have gone in the admission of parol testimony, to discharge parties who have put their signatures to commercial paper without any restriction. Those courts have done so by reason of their peculiar structure. Mr. Justice Duncan, in the last-cited case, predicates the right to receive parol testimony in such cases on the ground that the courts of law of Pennsylvania will administer any relief which could be obtained in a court of equity, there being no court of chancery in that State. But as the case at bar comes within the decisions of the courts of law in New York, heretofore cited, and no case has as yet been brought to the attention of this court, in which an adverse ruling directly on the point has been made, this court is arrived at the conclusion, that under the circumstances of this case the parol testimony is admissible. *The demurrer must, therefore, be overruled.*

Sloan & Love, for Plaintiff.
D. W. Perley, for Defendants.

TOBIN *et al. v.* WALKINSHAW *et al.*

Circuit Court, U. S., July Term, 1855.

Matter of avoidance in an answer responsive to the bill on a motion for an injunction, is to be deemed as the affidavit or sworn statement of the defendant;—on the trial it must be proved.

A plea for want of parties is not matter in abatement. It goes in bar to the whole bill. If the defect be fatal, it may be relied on by way of plea or in the answer.

If a joint interest is vested in the defendants with absent parties, the court has no jurisdiction; if the interest is separable, the jurisdiction attaches.

The act of congress of February 28, 1839, and the 49th Rule of Equity of the Circuit Courts of the United States, enable the court to dispense with nominal and, in some cases, necessary parties, but never with a party deemed indispensable.

Where one is out of the jurisdiction of the court, the fact should be made to appear in the pleadings; and it should be prayed that he be made a party should he come within the jurisdiction of the court.

Where any necessary party is within the jurisdiction of the court, and is not made a party, there is no jurisdiction, save in case the parties are so numerous as to bring the case within the exception to the rule.

Where a bill omitted to make two persons who were necessary parties, and who were within reach of process; and where there were absent parties, and without the jurisdiction of the court; and the bill prayed for cancellation of conveyances in which those absent parties were interested,—the court had no jurisdiction of the case.

This was a motion for, an injunction and the appointment of a receiver.

McAllister, J.—Among the numerous questions which have been submitted during the argument of this motion, there is one which arrests attention *in limine*, and, in the view I

have taken of the case, will preclude a decision on any other. That question is one of jurisdiction. In advance of any discussion on this point, I desire to advert to a question which was argued incidentally by the solicitors for the respective parties. I allude to the question—"How far is matter of avoidance in an answer to be treated as evidence by the court?" An examination of the authorities has conducted me to the conclusion that the rule is, that upon the hearing, after the answer is put in issue, new matter set up by way of avoidance must be proved by defendant; but that on a motion for, or on a motion to dissolve, an injunction, such new matter in the answer responsive to the bill is to be deemed evidence in favor of defendant, as his affidavit or sworn statement. As this opinion is necessarily very extended on what I deem the principal point in the decision of this motion, my reasons for the conclusion to which I have come in relation to the question of new matter in the answer, will be reserved for some future case or occasion.

In regard to the want of parties in this case, which gives rise to the question of jurisdiction, it has been urged by complainants, that it is too late for defendants to object a want of parties, and that this was matter only for a plea in abatement.

Now, a plea for want of parties is not matter for abatement. It is a plea in bar, and goes to the whole bill, as well to the discovery as to the relief prayed. (1 Daniel's Ch. Pr. 337.) Again, the rule is, that if want of parties is apparent on the face of the bill, the defect may be taken advantage of by *demurrer*. If such defect be vital, it may be insisted on at the hearing, and if the court proceed to a decree, such decree may be reversed. If the defect is not apparent on the bill, it may be propounded by way of a plea, or it may be relied on in a general answer. (Story's Eq. Pl. § 236.)

In *Van Epps* v. *Van Deusen* (4 Paige's Ch. R. 75), it is said, defendant is not bound to demur or plead. He may make the objection in his answer, and may have the same benefit of the objection at the hearing as if it had been taken by plea or *demurrer*.

The thirty-ninth rule of equity expressly gives the right to defendant to avail in his answer of anything which would be good in the form of a plea in bar; and the fifty-second rule provides, that where defendant by his answer suggests the want of parties, plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection alone. These rules evidently authorize a party to avail himself of a defect for want of parties as effectually in his answer as by plea in bar.

Had defendants availed themselves of the right to plead in bar, much time and discussion would have been saved. But they have the right to bring forward their objection in the form of an answer. Having done so, I am called on to decide if there are such parties before the court as will authorize it to adjudicate upon this cause, whether this court be deemed a court of general equity jurisprudence, or whether the peculiar structure of the limited jurisdiction of this court under the constitution and laws of the United States be considered.

In *Cameron* v. *McRoberts* (3 Wheaton, 591), where the citizenship of the other defendants than Cameron did not appear on the record, the Supreme Court of the United States certified —"If a joint interest vested in Cameron and the other defendants, the court had no jurisdiction over the cause. If a distinct interest vested in Cameron, so that substantial justice (so far as he was interested), could be done, without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone."

In *Mallow* v. *Hinde* (12 Wheaton, 194), the principle is affirmed, that though the rules as to parties in equity are somewhat flexible, yet, where the court can make no decree between the parties before it, upon their own rights which are independent of the rights of those not before it, it will not act. The court say, We do not put it "on the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever be their structure as to jurisdiction."

In *Russell* v. *Clarke's Executors* (7 Cranch, 98), the court say that, merely formal parties might be dispensed with; but where parties are essential to the merits of the question, and may be much affected by the decree, such parties are indispensable.

The principle enunciated by the Supreme Court in the foregoing cases, is a reiteration of one universally recognized in equity jurisprudence. (Story's Eq. Pl. § 137.)

The rule in equity differs from the rule of law, both in the necessity of joining all interested parties in the suit, and in the option of joining them as plaintiffs or defendants. At law, a disputed issue is alone contested, the immediate disputants are alone bound by the decision, and they alone are parties to the action. In equity, a decree is asked, and not a decision only; and it is therefore requisite that all persons should be before the court whose interests may be affected by the proposed decree, or whose concurrence is necessary to a complete arrangement. (Adams' Equity, 699, 703, 704.)

The act of congress of February 28, 1839 (5 Laws U. S. 321), and the forty-seventh equity-rule of this court, have been cited by complainant's solicitors and relied on to sustain the jurisdiction in this case. They have also adduced the case of

Doremus and Nixon v. *Bennett and others* (4 McLean, 224), as to the interpretation of the act of congress. That was a case at law. Now, it is true, that by their provisions, the Circuit Courts of the United States are authorized, in certain cases, to proceed against one or more defendants in the absence of others, where such others are not inhabitants of or found in the district when and where the suit is brought. But both the act of congress and the forty-seventh rule have been elaborately considered, and the construction of them fixed, by the Supreme Court of the United States in the recent case of *Shields* v. *Barrow* (17 Howard, 130.) In that case it is settled, that neither the act of congress nor the rule impinges on the general doctrine, and that if the citizenship of parties be such that their joinder would defeat the jurisdiction of the court, such fact will not supersede the necessity of making them parties; so far as the said act and rule apply to suits in equity, it is to be understood they are no more than the legislative affirmance of the rule previously established by the adjudications of the Supreme Court of the United States. The act of congress removed any difficulty as to jurisdiction between parties who are competent under the general rule of equity jurisprudence; and the forty-seventh rule of practice is only a declaration, for the government of practitioners and courts, of the effect of the act of congress and the previous decisions of the Supreme Court. "It remains," say the court, that a Circuit Court "can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights." (17 Howard, 141.)

The general rule as to the parties to a bill is not, then, altered by the act of congress and the equity rule cited by the solicitors for complainants; nor is that rule affected by the

limited jurisdiction of the courts of the United States. The fact that a person is without the reach of the process of the court will not dispense with the necessity of making such person a party, provided he be an indispensable one.

Parties to bills are divided into three classes (17 Howard, 139): 1. Nominal. 2. Necessary. 3. Indispensable. If a nominal party be beyond the reach of the process of the court, being a party having no interest to be affected by the proposed decree, that fact cannot defeat the jurisdiction of the court. An instance of this class of parties is, where one is joined as a party for sake of conformity in the bill, having no interest, legal or equitable, to be affected by the decree. The second class, known as necessary parties, are such as have an interest in the controversy, and ought to be made parties to enable the court to do complete justice by adjusting all the rights involved; still, if their interests are separable from those before the court, they are not indispensable parties. Mr. Justice Curtis has referred, as an instance of a necessary party, to the case of *Osborn* v. *The Bank of the United States* (9 Wheaton, 738). This case has been cited by the solicitors for complainants, as the strongest case; and in their written brief upon the point under consideration, they say: "This [case] seems to us conclusive as to the rule in a case of trespass." It is due to the able counsel and the importance of the question, that proper consideration be paid to this case. We shall give it that consideration hereafter.

The third class of cases enumerated by Mr. Justice Curtis are the indispensable, who have such an interest in the controversy that a decree cannot be made without affecting that interest; and the inquiry is, Do the pleadings in this case disclose the fact, that there are absent persons whose interests make them indispensable parties? The rule we are con-

sidering laid down generally is, that where the rights of an absent person will be much affected by the decree asked for, the court cannot proceed to a decree. This general rule is to be applied to the circumstances of each case as they shall arise. By ascertaining how this rule has been applied in precedent cases, we will understand how to apply it to the case at bar.

In *Mallow* v. *Hinde* (12 Wheaton, 194), the complaint set up a claim to a tract of land under a survey, No. 537, in the name of John Campbell, who, by his will, devised and bequeathed this, among other muniments of title, to Richard Taylor and others, executors in trust for the children of his sister. Taylor alone qualified, and took upon himself the execution of the trust. He never assigned or conveyed to the *cestui que trusts*, but permitted them to take the management of the claim into their own hands. Subsequently, when these last had arrived at full age, they entered into contracts with one Elias Langham, whereby he became entitled to survey No. 537, and he subsequently conveyed the land to complainants. Thus stood the case, when the defendant Hinde, with full knowledge of the rights of complainant, procured from Taylor a military warrant belonging to him (Taylor) in his own right, made an entry thereof in his (Hinde's) right, and having caused a survey to be made thereupon covering survey No. 537, obtained a patent for the land. Having thus got the legal title, he instituted actions of ejectment against the complainants, and obtained judgments of eviction against them. A bill, setting forth the whole transaction, charging notice of complainant's rights, and gross fraud against defendant was filed, which prayed for an injunction to enjoin defendant from proceeding on his judgments, and for general relief. Here was as tortious an act and as great fraud as could be perpetrated

under the forms of law, charged upon defendant. The defendant denied all fraud, set up the *bona-fides* of the transaction, neither admitted nor denied the contracts between the *cestui que trusts* and Langham, and insisted, if there were any such they were fraudulent. Neither Taylor nor the *cestui que trusts* were made parties, being out of the jurisdiction of the court. An objection for want of parties arose, and it was insisted that both Taylor and the *cestui que trusts* were indispensable parties.

The court so decided. They say, "The complainants claim through certain contracts made between Langham and the *cestui que trusts.* How can a court of equity decide that such contracts ought to be decreed specifically without having the parties before them? Such a proceeding would be contrary to all rules which govern a court of equity, and against the principles of natural justice." In respect to Taylor, it was urged that he had parted with his "incidental right;" but the court determined that he and the *cestui que trusts* were indispensable parties. "If," say the Supreme Court, "the United States Courts were courts of general jurisdiction, it could not be doubted that the absent persons would be indispensable parties." But it is urged, that the rule which prevails in courts of equity generally, that all the parties in interest shall be brought before the court, &c., ought not to be adopted by the courts of the United States, because, from the peculiar structure of their limited jurisdiction over persons, the application of the rule in its full extent would often oust the court of its acknowledged jurisdiction over the persons and subject before it. In answer to such argument, the court proceeds to show that no modification of the rule to an extent by which the rights of an absent person may be materially affected, is admissible, and concludes by saying—"We put this case on the

ground that no court of equity can adjudicate directly upon a person's rights without the party being actually or constructively before the court;" and the bill was found defective for want of parties.

In *Brookes* v. *Burt* (1 Beavan, 106, 17 Eng. Chan. Rep. 106), a bill was brought by one tenant in common against defendant, who, it was alleged, had wrongfully and in defiance of complainants' title, entered into possession and received the rents and profits of the property; it was further alleged, that complainants had commenced an action of ejectment for the premises, which defendant defended; that before the trial of such ejectment, plaintiffs discovered that the property was subject to an outstanding term which was vested in one Mr. Worsley, which defendant threatened to set up to defeat the action at law; and, lastly, the bill alleged that James Wavel, the co-tenant in common with plaintiffs, was at the time residing out of the jurisdiction of the court. (It should be observed here, that the objection was, that the co-tenant in common was not made a party complainant.) There was a general demurrer for want of equity, on the ground that Wavel the co-tenant, and Worsley, in whom the outstanding term was vested, were indispensable parties to the bill. The court decided that the holder of the outstanding term was not, but that the co-tenant was. On the argument it was urged in relation to Wavel, that he was part owner of the property; that, among other things prayed for, was a declaration of right, the delivery of the title-deeds of the property, and for an account of the rents and profits, matters in which the absent party was interested, and that therefore the suit which sought to deal with the inheritance was defective for want of parties. To this complainants replied, that the proposition embodied in the objection was, that if there be twenty tenants in common, and a stranger get possession, one

of the tenants in common cannot recover the possession of the rents and profits from the stranger without making the other nineteen persons with whom he has no dispute parties to the suit; that this was an ejectment bill, and must be governed by the same rules as an ejectment at law; that Wavel, the co-tenant, was out of the jurisdiction of the court. Lastly, it was urged that the complainants were entitled to some portion of the relief prayed for, and, at the time of the hearing, they might waive part of the relief sought, and obtain the rest; that the demurrer, therefore, covered too much, and must be overruled.

Such were the arguments by complainants in that case; and they are similar to those urged in this case by complainants' solicitors. To all the master of the rolls replied: "It appears to me, this demurrer must be allowed. . . . Where the demurrer is for want of parties, it is not sufficient for the plaintiffs to say, that there is some part of the relief which can be abandoned at the hearing. . . . The bill prays for accounts and the delivery up of title-deeds. . . . I conceive Wavel is a necessary party. . . . The demurrer must be allowed." (1 Beavan, 111.)

In *Turner* v. *Hill* (11 Simons, 1), a bill was filed to compel defendant to transfer her share in a mine to complainant, which it was alleged she had obtained by fraudulent means, and to account for and pay to plaintiff the profits thereof, and that a receiver might be appointed of the profits of the mines. It was objected, that the other adventurers in the mine were indispensable parties, inasmuch as an account was called for; and the vice-chancellor decided against the objection on the sole ground that the bill did not call for an account of the mine, but for that of the specific share sued for. He says, "That passage in the prayer of the bill which asks for a receiver of the profits of the whole mines, is clearly a mistake, for the plaintiff

is seeking, by his bill, to recover no more than a hundredth share of the mines; and therefore, in common fairness of construction, that passage ought to be referred to the profits of that share." Considering such to be the fair construction of the bill, he decided it was unnecessary to make the other shareholders parties.

A similar decision, for the same reasons, was made in the case of *Turner* v. *Borlase* (11 Simons, 17); and appeal was carried to the lord chancellor (11 Simons, 18), and the decision in it confirmed, the distinction drawn between a prayer for the profits of the mine and those of the particular share sued for, being carefully sustained. In giving his decision on the appeal, the chancellor said, "It was, however, observed, that the bill prayed a receiver of the profits arising from the said mines; and if that must necessarily be intended to mean the general profits of the mines, it would be asking for that which could not be granted, in the absence of all the other adventurers; but I do not understand the expression to have that meaning. All the case made and all the relief asked, relate to the particular shares," &c., "and I must understand the profits as to which the receiver is asked, to be the profits spoken of, which makes the whole consistent, and *for which purpose* the other adventurers would not be necessary parties." (11 Simons, 20.)

The decision of the court below was therefore affirmed, and the demurrer overruled; but the chancellor, in conclusion, declared, that his judgment on the demurrer was on the facts admitted by it; but if the facts at the hearing so admitted were not sustained, the opinion he had just delivered could have no bearing on the case.

The principles deducible from foregoing authorities are—

1. That the general rule in equity is, that all persons whose

interests may be materially affected by a decree, must be before the court to enable it to act.

2. That this rule may be relaxed so as to dispense with formal, and, under special circumstances, with necessary parties.

3. That the rule which has been announced by the decisions of the Supreme Court of the United States is but a reiteration of the doctrine of a court of equity in the application of its chancery jurisdiction.

4. That the act of congress of February 28, 1839, and the forty-seventh rule of equity, which allow one or more defendants to be sued in the absence of others without the jurisdiction of the court, apply only to competent parties, are simply an affirmance of previous decisions of the Supreme Court of the United States, and do not vary the rule as to indispensable parties. (17 How. 141.)

5. That the peculiar structure of the limited jurisdiction of the courts of the United States does not abolish or modify the rule as to indispensable parties; and the fact that such are without the jurisdiction, will not enable the court to proceed against the parties before it.

6. That it has been decided by the Supreme Court of the United States (12 Wheaton, 194), that where complainant seeks to set aside a fraudulent purchase of land by defendant, and to enjoin his proceeding on a judgment he had obtained in an ejectment at law against complainant, the party through whom the latter claimed his equitable title was an indispensable party.

7. That it has been decided in the English Chancery (1 Beavan, 106), that one tenant in common cannot, without joining with him his co-tenant, sustain a bill in equity against the trespasser in possession, and enjoin him from setting up an outstanding term, inasmuch as the bill prayed for the delivery of title deeds and account of the rents, these being matters in

which the absent person was interested, and was therefore an indispensable party; that where a question arises as to parties, it is not for the complainant to say, the court must proceed to a hearing when he (complainant) may disclaim a part of the relief and obtain the balance; and, lastly, that the fact that the absent party resided out of the jurisdiction of the court, made no difference in the application of the rule. These last principles are deducible from the case of *Brookes* v. *Burt.* (1 Beavan, 106.) It is to be again noted, that this was a case brought by one tenant in common to assert a right against a wrong-doer; and the absent tenant in common was deemed an indispensable party. How much stronger is the case at bar, where it sought to injuriously affect the rights of part owners, who are absent! If, in the former case, the person is deemed an indispensable party, *a fortiori* he must be so deemed in the latter.

8. That it has been decided that, where bill is filed to compel defendant to transfer to complainant a share in a mine fraudulently obtained by him, and to account for the profits thereof, jurisdiction will be sustained on the ground that the bill seeks only a specific share in the profits thereof; but it is expressly affirmed, that if the bill had sought for a delivery of title-papers, which touches the inheritance, or for an account of the mines, these being matters in which the other adventurers in the mine were interested, the court could not proceed, such other adventurers being indispensable parties.

Let us apply these principles to the case at bar. The complainants in their bill allege title to certain premises situate in this State; that defendants have wrongfully entered into possession thereof, and are committing a trespass thereon by cutting down timber and excavating mines or minerals therefrom, and that they (the complainants) have instituted an action of

ejectment against the defendants for the purpose of evicting them therefrom. The bill prays against defendants—

1. That an account be taken for the year preceding the filing of the bill, of the amount of timber cut and destroyed on the premises, and a similar account of the quicksilver so taken.

2. That injunction may issue to restrain defendants from further trespass.

3. That a receiver be appointed to take charge of the mine, and the reducing establishment connected therewith, and all the products thereof, now within the jurisdiction of this court.

4. That on the final hearing, the conveyances made, under which defendants claim title, may be ordered to be delivered up and canceled, the injunction made perpetual, and for general relief.

An answer has been filed, and the facts necessary to be looked to, in connection with the question as to parties, are found in pages 43, 44, and 45. The facts disclosed are, that there are proprietors of the mine and land other than defendants. That of them, four in number, viz.: Eustaquio Barron, Eustachio M. Barron, Martin La Piedra, and Maria Ortiz, are without the jurisdiction of this court; that John Parrott and James R. Bolton are also co-owners of the premises, and that they are within the reach of the process of the court. It is further averred, that long before the institution of the action of ejectment at law, and before the exhibiting of the bill, a contract was entered into by the owners of the mine, with certain persons, for the working of them; and it is contended that both the proprietors and contractors should be made parties.

Upon the authority of the cases cited above, I cannot doubt that the owners are indispensable parties in this case. In the opinion of the court, the authority of cases is hardly needed.

What is the character of this bill? It does not seek the interposition of this court to recover the specific shares of the mine or land, and the profits thereof, property of the defendants. If it did, it would come within the authorities, and the limits of natural justice. But the bill asks, that an account of profits belonging to other people, and title-deeds to property in which those other and absent persons are as much interested and to a larger extent than the defendants themselves, shall be canceled. It further asks that the profits of all the owners should be wrested from them and paid into the hands of a receiver. Now, can this court call for an account of the profits of the mine, or arrest such profits, or direct a cancellation and delivery of the title-deeds, in the absence of parties both within and without the reach of its process, who are interested in those profits and those title-deeds? Were the court to do any one of these things, would not the rights of the absent be materially affected? It is urged, that the court can entertain jurisdiction of this case, issue the injunction, and wait until the hearing, when the complainant may waive a portion of the relief prayed for, and the court can decree so much of that relief as they may be entitled to. This course would be contrary to authority, and in violation of the reason of the thing. We have seen that the lord chancellor has said in *Brookes* v. *Burt*, that when the question of parties arises, it is not sufficient for the complainant to say "that there is some part of the relief which can be abandoned at the hearing." Again, apart from authority, on what ground of justice or reason can this court arrest, by injunction, the profits of the mine from absent persons until the hearing, for the purpose of ultimately getting an account from the defendants of their specific interests? Would the arrest of these profits "affect" the interest of the absent owners? If so, should a court of equity proceed in their absence? "*Audi alteram partem*" is alike a dictate of natural justice

and a precept of municipal law. I have searched in vain for a precedent that would justify this course. The able counsel for complainants would have found such, if any existed. The case of *Osborn* v. *The Bank of the United States* has been adduced as the authority which seems to them conclusive in favor of such jurisdiction; and it has been intimated to me by one of the counsel, that it has been exhibited to several of his professional brethren, who concur in the opinion that it is conclusive on the point. That case, therefore, claims attention.

The opinion in that case occupies seventy-six pages of the Reporter. To show what were the points decided, by traveling through it, would be time misspent. But there is a short method of doing this, and one, perhaps, which will conduct to a more correct conclusion than any this court could pursue. By reference to the prospectus, published by Mr. Justice Curtis, in 17 Howard, it will be found, that his plan in giving his new edition of the Supreme Court Reports was, to endeavor to give, in the head-notes, the substance of each decision. They are designed, he says, to show the points decided by the court, not the *dicta* or reasonings of the court. Now, upon reference to his head-notes to *Osborn* v. *The Bank of the United States*, we find that the only points which, in his opinion, were decided in that case which touch the question under consideration, are— 1. A court of equity may restrain, by injunction, a public officer of a State, from acting under a void law of a State to destroy a franchise. 2. As the State cannot be joined as a defendant, its agent may be sued alone; and if he has specific moneys or notes wrongfully taken, in his possession, they may be ordered to be returned.

So far as any decision in this case goes, it does not touch the case at bar. But reference has been had to certain observations made by Chief Justice Marshall, while delivering the opinion of the court, and citations from the opinion have

been inserted in the brief of solicitors for complainants, which are deemed directly applicable to the case at bar. The first citation is from 9 Wheaton, p. 842, and is as follows: "The single act of levying the tax in the first instance, is the cause of an action at law; but that affords a remedy only for the single act and is not equal to the remedy in chancery, which prevents the repetition and protects the privilege. The same conservative principle which induces the court to interpose its authority for the protection of exclusive privileges, to prevent the commission of waste, even in some cases of trespass, and many cases of destruction, will, we think, apply in this. Indeed, trespass is destruction where there is no privity of estate. If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is, that, as the real party cannot be brought before the court, a suit cannot be maintained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree, unless all those who are substantially interested be made parties to the suit. This is certainly true, where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best-established principles to say, that the laws could not afford the same remedy against the agent employed in doing the wrong, which they would afford against him could his principal be joined in the suit. It is admitted that the privilege of the principal is not communicated to the agent; for the appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury. It being admitted then, that the agent is not privileged by his

connection with his principal, that he is responsible for his own act to the full extent of the injury, why should not the preventive power of the court also be applied to him? Why may it not restrain him from the commission of a wrong which it would punish him for committing?"

The propositions asserted in the above observations are—

1. That though the single act of an illegal tax is the subject of an action at law, its repetition makes it a continuing trespass, which a court of equity may enjoin.

2. That where the principal is exempt from all judicial process, being a sovereign State, the privilege which belongs to such principal is not communicated to the agent who does the wrong.

3. That under such circumstances the court, acting on the principle, "*Lex non cogit ad impossibilia*," will, at instance of complainant, issue an injunction to restrain the agent from committing the tortious act.

These propositions cannot control this case:

1. Because there is no question of principal and agent in this case.

2. The necessity of dispensing with a necessary party who was exempt from judicial process, does not exist in this case. (On page 846, C. J. Marshall says, "Had it been in the power of complainant to make it [the State] a party, perhaps no decree ought to have been pronounced.")

3. Because the attempt in this case is to make defendants liable as principals in a tort, and asks the court to arrest the profits of absent parties for the purpose of making defendants responsible for the consequences of their own tortious act.

There are two other citations from the opinions of the court. The first, is a continuation of the first above quoted, and is

in these words: "We put out of view the character of the principal as a sovereign State, because that is made a distinct point, and consider the question singly as respects the want of parties." Here this second citation ceases, and another is taken from the succeeding page (844), as follows: "In the regular course of things the agent would pay over the money immediately to his principal, and would thus place it beyond the reach of the injured party, since his principal is not amenable to the law. The remedy for the injury would be against the agent only, and what agent could make compensation for such an injury? The remedy would have nothing real in it. It would be a remedy in name only, not in substance. This alone would, in our opinion, be a sufficient reason for a court of equity. The injury would, in fact, be irreparable; and the cases are innumerable in which injunctions are awarded on this ground." Now, this latter citation establishes this proposition, viz.: That the agent would pay over to the principal, who was exempt from all judicial process, and being unable to respond to the damages, the injury would be irreparable, and, therefore, it is ground for injunction. To this extent it goes; but the whole is dependent for its application upon the fact, whether defendant is responsible upon an implied contract solely for the amount in his hands. This is evident, as the court puts the hypothesis. "Now, *if* the party before the court would be responsible for the whole injury," &c.

To prove why the court considers the defendant liable, it is necessary to cite the remarks which intervene between the two quotations cited above: "Now, if the party," say the court, "would be responsible for the whole injury, why may he not be restrained, &c. The appellants found their distinction on the legal principle, that all trespasses are several as well as joint, without inquiring into the validity of this reason, if it be

true. We ask if it be true? Will it be said, that the action of trespass is the only remedy given for this injury? Can it be denied that an action on the case for money had and received to the plaintiff's use, might be maintained? We think it cannot; and if such an action might be maintained, no plausible reason suggests itself to us for the opinion that an injunction may not be awarded to restrain the agent with as much propriety as it might be awarded to restrain the principal, could the principal be made a party." It was on the ground, then, that the equitable action for money had and received could be maintained against the agent,—for money in his hands, and received by him in legal consideration to the use of plaintiff,—that C. J. Marshall uses the observations quoted, to sustain the proposition that injunction might issue to restrain the payment over by the agent to his principal. Can this apply to the case at bar? No one pretends that such action could lie against defendants in this case. Independently of all other views, there is one which covers this whole case, and precludes the idea that it can control the one at bar. It has been shown that the absent parties are indispensable in this case. Such was not the fact in the case relied on. The State of Ohio was but a necessary party, and there was a discretion in the court to dispense with such party. True, the interest of the State, in *quantity*, extended to the whole amount in controversy; but what was the *nature* of that interest? It was not a vested nor an equitable interest. It was never in the possession of the absent party; nor had the State an equitable right to it, for the court never could recognize the possession of a fund, or an equitable right to possession in the principal, where that fund had been raised *in fraudem legis* by the agent. The object of the bill was to arrest the fund in its transit from the agent to

the principal. Hence, the nature of the interest held by the State was, to use the language of Mr. Clay, in his argument, "a collateral and contingent interest," which will not make a party who must be joined. Hence, again, Mr. Justice Curtis, in 1855, in the case of *Shields* v. *Barrow* (17 Howard, 130), in his classification of parties, enumerates several instances of the different kinds of parties, excluding the case of *Osborn* v. *The Bank of the United States* from the class of indispensable, and including it among that of necessary parties; which latter, as we have seen, may under peculiar circumstances be dispensed with.

It is by attention to the distinction between necessary and indispensable parties, that the numerous decisions of the courts, made in the application of the general rule, may be harmonized.

Cases have been referred to, in which persons who are without the reach of the process of the court have been dispensed with; but in all such it will be found, that the absent persons were either formal or necessary parties, but not deemed indispensable.

In this case, I am satisfied that the owners of the mines are parties whose interests must necessarily be affected by any decree which can be made in conformity with the prayer of this bill. Cases are also cited to show that the courts of the United States will consider the rule as to parties flexible where the absent persons, who should be made parties, are out of the reach of the process of the court; but in each of them it will be found, that the utmost extent to which a relaxation has been carried, has been to dispense with a necessary party only. But there is one feature in this case which distinguishes it from all others. It is, that two of the absent persons whose interest

would be affected by a decree, are residents of this city and within the reach of the process of this court. The only reason for their omission as parties is the fact, that their introduction would oust the jurisdiction of this court. But if bringing them before the court, this case would be beyond its jurisdiction, can the court, by indirection, adjudicate upon their rights, and thus do indirectly what it could not, rightfully, directly do? I think not.

The present motion is therefore denied, and it is ordered accordingly.

E. L. Goold and *E. W. F. Sloan*, for complainant.

A. C. Peachy, for defendant.

TEESE *et al. v.* PHELPS *et al.*

Circuit Court, U. S., July Term, 1855.

The construction of the specification in an application for a patent, so far as the language is concerned, is a question for the court.

The application of the facts to the law is for the jury.

The clearness the law requires in a specification is such as will distinguish the thing patented from all others previously known, and which will enable a person skilled in the art of which it is a branch, to construct the thing specified.

The production of the patent is *prima facie* evidence of novelty.

If the idea involved in the patented article has occurred to others, if that idea has not been embodied in a practical form, it will not disprove novelty.

If the article produced be substantially the same with the one patented, with variations in *form* only, or where a new and substantial result is not produced, such cannot affect the right of plaintiff.

If there be invention, to whatever extent, it is sufficient.

If the process required no more skill than that possessed by an ordinary mechanic skilled in the business, there is an absence of inventive faculty, and only the exercise of mechanical skill.

This was an action at law brought to recover damages for the infringement of a patent; and the following instructions were given to the jury.

McAllister, J.—To sustain this action, the plaintiff must establish:—

1. That the improvement he claims was properly explained in the specification which accompanied his application to the patent-office.

2. That such improvement is useful and novel, and that he was the first and original inventor.

3. He must establish by proof the infringement of his patent, and the actual damages incurred by reason thereof.

As to the specification,—so far as the construction of the written words of that document is concerned, it is a question for the court. The application of the facts to the specification as construed by the court, is an inquiry you are to make. On this point I instruct you that the clearness the law requires in a specification must be, such as will distinguish the thing patented from all others previously known, and which will enable a person skilled in the art or science of which it is a branch, or with which it is nearly connected, to construct the thing specified. The testimony is before you on this point, especially that of John Kittedge, which you will apply to it.

The utility of the improvement claimed has been admitted; but its novelty is disputed. The rules that are to control you in deciding on this fact are these: The production of the patent is *prima facie* evidence of the novelty of the thing patented; and the production of it imposes upon the defendant the duty of proving that the patentee was not the first inventor. In the investigation of the testimony invoked by defendant to negative this *prima facie* evidence, you will carry with you for your instruction the following rules:—1. Should you conclude that the idea of the improvement claimed in this case had occurred to others, few or many, still, if that idea has not been embodied in some practical form, the existence of that idea will not disprove the novelty of the improvement. 2. If you should conclude that the idea of this improvement, and hints concerning it, had come to the patentee from others, still, if the patentee was the first who gave to that idea a useful and practical form, his rights are not to be defeated.

The next point is the infringement. This is where the article constructed and produced in evidence is substantially the

same with the one patented, the variations being in form and not in substance; or where a new and substantial result is not produced by such variation. Such will not affect the right of plaintiffs. (Peters' C. C. Rep. 394. *Gray & Osgood* v. *James, et al.*)

Before directing your attention to the damages, I desire you to look to the evidence in this case tending to show an abandonment by plaintiffs, and whether the improvement patented is patentable. Prior to the act of congress of March 3, 1869 (5 Statutes, 353), if the patentee had allowed the public use of his invention, or the free use of it to individuals, before he applied for his patent, it would invalidate the patent. Such is no longer the law; and the use of his invention by individuals, unless it had continued more than two years prior to the obtainment of his patent, will not invalidate it. (Curtis on Patents, §§ 58, 307.) This, although the use of it was with permission of the patentee. If, on the contrary, the use is without his consent, it is a trespass upon his rights, unless such use was so frequent, public, and notorious, and was continued so long a time and attended by such circumstances as raised a conclusion that the party had abandoned his right. (Curtis on Patents, § 308; 3 Story, 402; 1 Story, 280.)

Is the improvement claimed patentable? On this point, you will observe that the claim is for a new combination of the flat-bottomed tines of the fork with the sharp, angular formation of the upper sides of the tines. It is claimed that, by this combination, a novel and useful result has been obtained. If such result has been obtained, neither the simplicity of the structure nor the greater or less amount of invention or intellect employed as an element, are of importance in determining the validity of the patent. The distinction is, that where there is a mere application of an old thing to a new use, it is not

patentable; but where there is exhibited an inventive faculty in the process, it is. (Curtis on Patents, §§ 11, 12.)

To illustrate: In one case, a claim was made for an improvement in making a mold-board to a plow, by which the molding part, or face of the mold-board, was made to work in circular lines instead of straight lines; by which it was claimed that every part of the furrow-sluice was embraced far more than by any other shaped plow, &c. The court say, "that if by changing the form and proportion a new effect is produced, there is not simply a change of form and proportion, but a change of principle also. In every case, therefore, the question must be submitted to the jury whether change of form and proportion has produced a different effect." (2 Brock. 310.)

In another case, a claim was made for an improvement in making friction-matches, by means of a new compound; and it was in proof that all the ingredients had been in use before. The court say, "The question is, had the materials been in the same combination? if not, it was patentable, however simple it might be. (3 Sumner, 514.)

In another case, the arrangement of bowed flyers in a fly-frame in *two* rows, was held to be patentable, although open-bottomed flyers had been previously arranged in the same way in *one* row. (*Davoll* v. *Brown*, 1 Wood. & M., 53.)

Thus much as to the amount of invention required. I will now direct your attention to one or two cases where the patents were decided to be invalid on the ground that the improvement claimed was an application and not an invention. A claim was made for an improvement, being a new mode by which the back of a rocking-chair could be reclined and fixed at any angle required, by means of an apparatus; and the patent was

declared void because the same apparatus had been long in use, and applied to other machines, if not to chairs. (2 Story, 408, 411; 1 Wood. & M., 291.)

In *Hotchkiss* v. *Greenwood* (11 Howard, 248, 265), the claim was for an improvement in making door and all other knobs of all kinds of clay used in pottery, and of porcelain, in having "the cavity in which the screw or shank is inserted, by which they are fastened, largest at the bottom of its depth, in the form of a dovetail, and a screw formed therein by pouring in metal in a fused state." The patent was deemed invalid for want of invention.

Upon this question of invention, it is proper you should have some general rule, to control you while acting upon the evidence in the case which refers to it; and I instruct you that, if the flattening of the bottom of the tines of the fork is a process which, in your opinion, required no more skill or ingenuity than that possessed by an ordinary mechanic skilled in the business, the patent is invalid. If, on the other hand, there was an exhibition of inventive faculty beyond the skill of a capable mechanic, the patent is good.

As to the damages. The statute gives actual damages sustained by the plaintiffs; the power to inflict a greater amount is committed to the discretion of the court, within the limit of trebling the actual damages found by the jury. If the plaintiff has given you sufficient testimony to enable you to find the damages incurred by him, by sales made of the article constructed by defendant, that will constitute a correct basis on which you can act. If none such has been given to you, your attention must be directed to such other items which he has proved. The damages in actions similar to the present, must not be conjectural, but actual.

With foregoing views of the legal principles which should control you in your deliberations, I leave with you the facts for your adjudication.

Verdict for plaintiffs for the sum of $800.

Charles H. S. Williams, for plaintiffs.
B. S. Brooks, for defendants.

BERTRAM *et al. v.* LYON.

Circuit Court, U. S., July Term, 1855.

When the *substance* of a thing sold, is not in existence at the time of sale, such sale is void.

A mistake without bad faith, made in the description of the brand on flour barrels does not so essentially change the *substance* of the flour as to render void the sale.

Where the sale note described the flour as "Haxall," whereas it was branded "Gallego," the sale was not avoided; but the description amounted to a warranty, for breach of which, damages, if proved, could be recovered.

This action is brought by vendor against vendee, to recover the purchase-money for two thousand barrels of flour sold.

A special verdict has been agreed upon by the parties.

The answer of defendant consists of six different pleas.

The first is the statute of limitations; the sixth is a denial of the allegation in the complaint, which avers an assignment of Flint, Peabody & Co. to the present plaintiffs. These two *pleas* are disposed of by the special verdict agreed on, and the court is remitted to the issues raised by the four intermediate

pleas. All these resolve themselves into a general denial of the allegations of the complaint, setting up a contract of sale.

On the argument, it was contended by the counsel for the defendant, that the description in the contract, that the flour sold was "Haxall," when it turned out to be "Gallego," rendered the contract void upon the legal principle, which requires that, to constitute a contract, there should be a grantor, a grantee, and a thing granted. That this case comes within the operation of the rule, that where parties contract in relation to a thing which at the time of the execution of the contract they believed to be in existence, and which it is ascertained had no existence at the time, the whole contract is void, inasmuch as the consent of the parties had never met on the subject-matter of the contract, it not having been in existence.

The facts in the case will be found in the special verdict commented on in the opinion of the court, delivered by

McAllister, J.—In this case, it appears by the facts patent on the face of the agreed verdict, that the assignors of plaintiffs were owners of a cargo of flour, consisting of two thousand barrels, branded as "Gallego," "being at the time on board the ship 'Ork,' lying in this harbor, composing the entire cargo of said ship, and inspecting superfine 1771; bad, 229 barrels." That as such owners, they entered into a written contract with defendant, by which they sold to him "the cargo of Haxall flour now on board the ship lying in the harbor (of San Francisco), being about two thousand barrels," on the terms mentioned in the contract. Among those terms was, that one price was to be paid for "superfine," another for bad flour.

It is contended by defendant, that the brand of the flour being described in the contract as "Haxall," whereas, in fact,

it was branded "Gallego," the whole contract was void. To sustain this position, a decision from the Supreme Court of this State has been cited.

In the case of *Flint* v. *Lyon* (4 Cal., 17), that court say, in reference to this very contract, "How, then, stands the case? The contract was founded in mistake; both parties supposing they were contracting concerning a certain article which had no existence, consequently the contract was void for want of substance of the thing contracted for." If the flour sold had no existence at the time of the contract, it is certainly true that no contract could have been made in relation to that the substance of which was not. It would come within the operation of the elementary principles of law, that in order to constitute a valid contract, there must not only be parties capable of contracting, but a thing in existence, the subject-matter of the contract in regard to which there had been an "*aggregatio mentium*," This rule is practically illustrated in *Leach* v. *Mullett* (14 Eng. C. L. Rep., 233), where, by mistake, a house was sold at auction and so described that it did not refer to the house the parties intended to buy and sell, but to another house not in the contemplation of either party. Here was a clear mistake as to the *substance* of the thing intended to be sold. There are various cases where the article contracted for is of a different species from that treated for. Thus, where an article was sold as "indigo," which was not indigo, but a fraudulent compound made to resemble it; or where a stone was sold as a "Bezar" stone, when in fact it was not such a stone; and various other cases. But in all such, the contract has been deemed, void in the absence of fraud, in a court of common law, by reason of the want of a subject-matter. It has been, where the *substance* of the thing was not *in esse* at the time of the contract, or the description so materially

wrong, that the substance of the thing must be essentially changed in order to answer the description in the contract.

Does this case come within the foregoing rule?

The special verdict finds the subject-matter of the contract to have been "a cargo of flour at the time on board the ship 'Ork,' lying in the harbor of San Francisco, being about two thousand barrels." In the contract, the flour is represented to be "Haxall," whereas it was branded "Gallego" flour; and the question is, did these two thousand barrels of flour, the cargo of the ship "Ork," cease to exist in substance, or, to use the language of the authorities, to have "a potential existence," because the brand upon them was different from that described in the contract? In other words, Was this description of the brand a representation or warranty? or, was the brand so essential an element of the flour, that the latter ceased to exist *in substance* when the former was erroneously described so as to be made incapable of being the subject-matter of a contract? In cases in which executed contracts, such as the one in controversy, have come under consideration, where there had been through mere misapprehension a wrong description of the article sold, the question arose, whether the description amounted or not to a warranty? Thus, in *Shepherd* v. *Kane* (7 Eng. C. L. Rep., 82), where a ship was described as a "copper-fastened vessel," it appeared, in fact, that she was only partially copper-fastened. The court say, "Here the ship was not a copper-fastened ship at all." Still, so far from considering that the ship ceased to exist, and the contract void for that reason, the court upheld it as a contract with warranty; consequently, in an action for breach of warranty, damages were assessed against the defendant.

In *Seixas* v. *Woods* (2 Caines, 48), an action was brought for selling peachum-wood represented to be brazilette, the former

worth hardly anything, the latter of considerable value. Peachum-wood and brazilette-wood constituted the same substance, although different in name and value. Still, the negotiation in relation to it was not treated as a void contract. The only question was, whether there being no express warranty, the law would annex to the contract, under the circumstances, an implied one.

Further references to authorities is unnecessary; but if they are needed, it is only necessary to refer to the decision of the Supreme Court of this State which has been relied on by defendant. It is true, as stated, that the court in that case declared the contract in this, "to be void for want of the substance of the thing contracted for" (4 Cal. 21); but in the same opinion they take a different view of the sale-note, and recognized it as a contract containing a warranty. They declare, that the use of the word "Haxall" in the sale or note amounted to a warranty that the flour was "Haxall." Now, it is impossible to come to a conclusion in this case that there was a warranty, and at same time consider that there was no contract. (*Ibid.* 20.) If the contract was void for one purpose, it was for all; and if null as to one party, was so as to both. The warranty was created by the contract. The latter is the principal, the warranty the incident. If the one had no vitality, the other could have had no existence. The fair inference, then, is,—whatever comments were made by the Supreme Court of this State in the case cited, upon the character of this contract,—the court recognized a legal contract which, by its terms, fixed upon one party the obligations and conferred upon the other the rights arising out of a warranty of the article sold. So far as the contract is recognized as a subsisting one by the Supreme Court of this State, this court is prepared to go.

It is a contract which by its terms passed a title to the property to the defendant; and whether the description inserted in the sale-note amounted to a warranty; and, if it does, whether the only remedy for any loss which may have accrued to defendant (if any such has accrued), is to be found in an action for breach of warranty,—are questions it is unnecessary to decide in this case.

The complainants predicate the cause of action upon the allegation of a sale of a certain cargo of flour, and allege the *assumpsit* of the defendant to arise out of such sale.

The question submitted by the special verdict is, whether upon the whole matter found, the defendant did promise and undertake as alleged.

Now, with the views entertained by the court, the allegations in the complaint are sustained by the proofs. The insertion by mistake of the word "Haxall," did not annul the contract. At the utmost, it amounted to a warranty that the flour should be of that brand. If the pleadings had been so shaped in this case, and the evidence so marshaled, as to have enabled the court to look into the case as one in which a *recoupment* was asked in the nature of damages for breach of a warranty, the court may have gone into the investigation. But there is no plea stating special damages, nor any evidence stating the amount. Had the pleadings in this case raised the question of the right of defendant to avail of a breach of warranty, the court could have considered it; but the facts as disclosed in the special verdict give no *data* by which to assess damages. But if the contract is valid, and assuming the pleadings to be such as would authorize defendant to give evidence of his loss by a breach of warranty, the measure of damages would be the difference in value between

"Gallego" flour at the time of sale, and "Haxall" flour as it was represented to be in the sale-note. Now, the statement as to value in the agreed verdict is as follows: "In the opinion of some *experts*, there existed no difference in the quality or price of flour branded and known as 'Gallego' and 'Haxall,' each inspecting superfine; but in the opinion of other experts, there was a difference, some preferring 'Haxall' and some 'Gallego.'" This evidence certainly would not authorize the assessment of damages in an action for the breach of the warranty, nor prove any damages were the defendant attempting to set them up by way of defense in this action.

What, then, is the aspect of this case?

The written document relied on by the plaintiffs, the court considers to be a contract. It is an entire and executed one. It transferred the cargo of the ship "Ork," which by its very terms is sold to defendant, who, in his note of 25th January, 1853, in which he directs a delivery of fifty barrels, writes of the latter as being "out of the lot purchased from ship 'Ork;'" and the contract speaks of the delivery, and stipulates, that at the expiration of a certain number of days, if the cargo be not previously delivered, the defendant may land all that remains, should he so elect; provided he pays the storage and drayage expenses. The title to the flour became vested, and he has already received a part of it.

Whether the defendant had a right, on discovering as he did, after the second delivery order, that the flour was "Gallego," to rescind the contract, has not been argued; and cannot legitimately arise in this case, as at that time having received and appropriated a portion of the flour, he was not in a position to place the adverse party in *statu quo* in the event of a rescission of the contract.

A judgment must be entered for the plaintiffs.

If the court has erred in foregoing views, the amount involved will fortunately enable the defendant to have any such error corrected by a higher tribunal.

John K. Hackett, for plaintiffs.

Saunders & Hepburn, for defendant.

Affirmed, 20 Howard, 150.

SEABURY AND OTHERS *v.* FIELD AND OTHERS.

Circuit Court, U. S., July Term, 1855.

FRAUD is not admissible in a court of law, to impeach a patent or legislative grant; but where a party, in order to bring himself within a class of legislative grantees, must exhibit his muniments of title, fraud is admissible to prove that they have been dishonestly obtained.

Courts of law and equity have concurrent jurisdiction of fraud in many cases.

This court is not bound to notice in its charge any matters, if it thinks it not proper to do so, unless its attention is called to them, and it is asked to instruct the jury in regard to them.

A verdict was rendered at the present term of this court in favor of the plaintiffs; and a motion is made for a new trial upon three grounds, all of which are enumerated in the opinion of the court, delivered by

MCALLISTER, J.—The last ground on which this motion is predicated will be considered first. It is in these words: "That

the course pursued by the plaintiffs' counsel in withholding the pretended resolution of the Council, of October 3, 1849, until after the testimony was closed, and then suddenly introducing it, operated as a surprise on the defendant's counsel, and tended to mislead the jury."

Under the impression there had been such irregularity as might have operated a surprise on the defendant's counsel, this court determined to set aside the verdict of the jury, and in order to satisfy itself as to the fact, required an affidavit to be filed as to the truth of the statement made on this ground of the motion. This requirement was made in the exercise of the discretion reposed in this court on motions like the present; and in analogy to the practice of our State courts as regulated by the act of the legislature of this State, art. 928, 929 (Woods Dig. 192), which declares, that where a motion for a new trial is moved on the ground of irregularity or surprise, it shall be made upon affidavit. The attorney for defendants having declined to file any affidavit, it becomes the duty of the court to limit itself to the consideration of the other grounds taken.

The first is, "because the verdict is contrary to evidence;" and the second, "that it is contrary to the instructions of the court upon the facts proved." These may be appropriately considered together. The evidence in the case was mainly directed to the fact of fraud in the grant made by Alcalde Leavenworth, to one Parker, and arose out of the following circumstances: The plaintiffs and defendants alike claimed the premises in dispute, under an act of the legislature of this State, passed March 26, 1851, entitled "An Act to provide for the disposition of certain property of the State of California," which conveyed a certain interest in lands, including the premises in dispute, to two distinct classes of persons. (Comp. Laws,

764.) The first included those who had purchased the land in dispute by the authority of the town-council of the city of San Francisco, or of an alcalde of said city at public auction, in accordance with the terms of the grant known as the "Kearney" grant to the city of San Francisco, the grant of which land had been recorded in the office of the recorder of San Francisco, within a period of time specified by law.

The plaintiffs claimed to be comprehended in this first class, as purchasers at public auction under the Kearney grant. The defendants claimed to be included in the second class, as deriving title from the fact that they held through a grant from Alcalde Leavenworth confirmed by the *ayuntamiento* of San Francisco, and recorded as required by the act of the legislature. To exclude the defendants from the second class, the plaintiffs offered evidence to show that one of the steps taken by defendants which placed them in the class of grantees, to wit, the obtainment of the alcalde's grant, was fraudulent, and that the grant was recorded by the perpetration of a fraud, and the confirmation of the grant was also obtained by fraud. Such evidence, it is to be observed, was not adduced to prove fraud in the legislative grant; but simply to show that the defendants had, by the perpetration of a fraud obtained a position which enabled them to deceive the legislature, and defeat its true policy by bringing themselves within the letter of the law.

The court considered the case not unlike that where the legislature had granted certain lands to persons who held bonds of a certain description, and some of them presented bonds which were forged, or possession of which had been fraudulently obtained. In such case, proof of those facts would have been admissible; for it was not reasonable to suppose that the legislature could have intended to include the holders of both the genuine and fraudulent bonds.

The alcalde grant was not the source of title; it gave no title whatever. The only source of title was the act of the legislature, and the only use of the alcalde grant was to prove that defendants had taken the proper step so as to have applied to them the description given by the legislature as to who were to take under the statute; and the evidence was admitted to prove that such step had been fraudulently taken. The court could see no difference between the forged bonds and the fraudulent grant, when viewed not as the source of title, but as proof to identify the grantees. The court therefore permitted the defendants to give proof of fraud, in this case, to the jury; and this is made an additional ground for a new trial, which it is proper to dispose of at this time. To have excluded all evidence from the jury as to fraud, would have been in substance to instruct them that the legislature intended to include the honest and dishonest purchaser in the same category—the holder of the genuine and the forged bond —the *bona-fide* purchaser and him who had contrived by fraud, covin, or perjury, to obtain the *ear-marks* described by the act. To consider otherwise, this court must attribute to the legislature an intention to include those who could not bring themselves honestly within the class of grantees designated.

The counsel for defendants have urged with characteristic ability, that plaintiffs must recover on the strength of their title; and such recovery could not be affected by any equities of the adverse party; and that the authorities cited by the plaintiffs' counsel were inapplicable to this case, being those in which bills had been exhibited in chancery to fix constructive frauds upon persons standing in fiduciary relations to complainants. But it is to be observed, that the case at bar is not one in which it is sought to set aside a conveyance or

other instrument for fraud; but one where a party in a court of law is to make out by evidence that he answers to a certain description given in a statute, so as to take as grantee; and the question is, Can he be met with evidence of fraud, perjury, or forgery in the obtainment of that evidence? Again, the proof offered in this case is not to prove any equities set up; but simply to disprove plaintiffs' case, viz. that they are not the parties they describe themselves to be. The former is a class of cases in which fraud is solely cognizable in a court of equity. This is not one of them.

It is an admitted principle, that a court of law has concurrent jurisdiction with a court of equity in some cases of fraud. Such doctrine is enunciated by the Supreme Court of the United States in the case of *Gregg* v. *Lessee of Sayre and Wife* (8 Peters, 244), which was an action of ejectment; and this doctrine is reasserted in kindred cases.

This is founded upon a legislative grant which was not assailed by the evidence offered. The evidence admitted went only to prove that one of the steps defendants had taken, and which it was necessary for them to prove, to entitle them to take under the legislative grant, in fact had never been in good faith taken. The court cannot perceive error in the ruling in of evidence of fraud in this case. When "matters alleged to be fraudulent are investigated in a court of law, it is the province of the jury to find the facts and determine their character." In this case the facts were left to the jury, and the court charged them that "it was their province to judge of them independently of the court, limited only in their inquiries by the boundaries of truth." Upon the facts, and under that charge, the jury have returned a verdict, which the court is asked to reverse.

It is urged, that a motion for a new trial is an appeal to the

discretion of the court. But that discretion is controlled by as well settled principles as is the judgment of the court in any any other case. No one of those principles is more clearly settled than that which inculcates that the verdict of a jury will not be set aside as against evidence where there has been evidence on both sides, even where such verdict, in the opinion of the court, has been given against the preponderance of evidence, unless some known principle of law has been violated, or manifest injustice has been done.

Now, in the protracted trial of this cause, evidence was given on both sides. The plaintiffs, to disprove the fact that defendants came within the description of the grantees described by the statute, introduced testimony, not to impugn the legislative grant, but the acts of defendants which they alleged gave them a right to claim under that legislative grant. The evidence was introduced to prove that defendants never had obtained a grant from Alcalde Leavenworth which was a valid one. With that view the evidence was used to show that, unlike all other alcalde grants, no consideration passed between the grantee and the alcalde; that on the day following the date of the grant issued by Leavenworth as alcalde, Parker, the grantee, reconveyed the lot to Leavenworth as an individual; that the four persons at that time composing the *ayuntamiento* who confirmed the grant made by Leavenworth, at one and the same time, and by one and the same instrument, confirmed numerous grants made to themselves individually by the same Alcalde Leavenworth, and under the same circumstances; that on the 3d October, 1849, the *ayuntamiento* who had succeeded to the one who had confirmed the grant, denounced the transactions of Alcalde Leavenworth in granting lands under the circumstances he did, and publicity to such denunciation was given at the time; that the character of the

transaction was notoriously known; and, finally, such confirmation, if not fraudulent, did not include the lot in dispute, but referred to other lots granted by Alcalde Leavenworth under different circumstances, and that the grant on its face bears date in 1848, and is recorded as bearing date in 1849. Evidence was introduced to explain the variance which existed between the dates of the grant and the record. A witness was sworn who testified that the date on the face of the grant was correct, and that he (the witness) had carried the document in 1848 to be recorded. Now, all this is testimony upon which the jury should pass. They have done so, and under the rule stated, did this court even consider that the evidence preponderated against the verdict, it would be, it conceives, an aggression on the rights of the jury to nullify their verdict, unless satisfied some principle of law had been violated, or manifest injustice had been done. The court cannot arrive at such conclusion in this case.

The remaining ground taken is, in these words, "Because the court should have instructed the jury as matter of law that the resolution of the Council of October 11, 1848, was a confirmation of the grant by Leavenworth to Parker, within the meaning of the act of 26 March, 1851." To have so instructed them would have been to charge them to dismiss from their minds all the evidence which tended to prove that there had been no confirmation, it having been procured by fraud, and which under the previous ruling of the court had been permitted to go to the jury. If there be error in that ruling, it was in the power of the party to have excepted to it.

A second reply is to be found in the fact that the court was not asked so to instruct the jury; as will be seen by the seven instructions asked by defendant's counsel. Had they been asked they would have been given, with a qualification.

As this point is of great practical importance in this court, it may be well to express explicitly its views upon the subject. To every legal proposition applicable to a case, a party has the right to ask from the court an instruction to the jury; to the ruling on which the party has the right to except, in the manner and at the time prescribed by the rules of this court; but this court is not bound to notice, in its charge to the jury, any matters of law if it thinks it proper not to do so, unless its attention is called to them, and it is asked to instruct the jury in regard to them.

In *The United States* v. *Fourteen Packages*, Gilpin, 252, Judge Hopkinson, *arguendo*, says, "If the counsel in a cause desire to have the opinion of the court given to the jury upon any point or matter of law, it is their duty to state it implicitly, and to ask the opinion of the court, or they cannot make the silence of the court, or an omission to instruct the jury upon that point, a ground for a new trial. Misdirection is always a good ground; but not, an omission to direct when no direction is required. When a charge or opinion is wanted on a particular ground, it must be particularly stated and asked for. Such is the practice, and such it ought to be, or verdicts would be perpetually in danger from concealed objections."

The third clause of the 43d rule of this court declares, "All exceptions to the charge of the court to the jury shall be specified in writing, immediately on the conclusion of the charge, and handed to the court before the jury leave the box; and the bill must be prepared in form and presented to the judge within two weeks after the verdict."

The 32d rule of this court further provides, "that all instructions required by counsel to be given to the jury shall be presented in writing, and argued to the court before opening the argument to the jury."

Upon a review, therefore, of all the grounds taken, the court is unwilling to disturb the verdict of the jury.

The motion for a new trial is overruled.

Holliday & Saunders, for plaintiffs.

Lockwood, Tyler & Wallace, for defendants.

Reversed, 19 Howard, 823.

EX-PARTE DES ROCHERS.

Circuit Court, U. S., July Term, 1856.

THE Circuit Courts and Federal Judges have the power to apply the writ of *habeas corpus* to all cases which it would reach at common law, *provided* it is not issued to any person in jail, unless confined under or by color of the authority of the United States.

This is an application for a writ of *habeas corpus*. The applicant states himself to be an alien, and a subject of Napoleon III., Emperor of the French. That he has an action at law pending in the Supreme Court of this State, in which he is plaintiff, and the county of San Francisco is defendant, for the sum of sixteen thousand dollars; and delay in the decision thereof is a great injury to him. That said suit was argued and submitted to the Supreme Court of this State, and taken under advisement at the January Term, 1856. That the court is composed of three judges, the Hon. Hugh C. Murray,

the Hon. David S. Terry, and the H on. Solomon Heydenfeldt That by the law organizing said court, the presence of two of the said judges is made necessary to transact business, and their concurrence to pronounce a judgment. That according to law a term of the said Supreme Court should have been held at the city of Sacramento in this State, in the present month of July, commencing on the first Monday of the month. That one of the judges of said court, the Hon. Solomon Heydenfeldt has been and still is absent from the State; that the Hon. David S. Terry, another of the judges of said court, is unlawfully restrained of his liberty, against his consent, by certain persons (whose names are given in the petition) in the city of San Francisco, and in the Northern District of the State of California, and held by them in unlawful custody, and is not confined in any jail, nor by the color of authority of any State or of any magistrate thereof; that the said David S. Terry has been so unlawfully restrained of his liberty against his consent since the 21st day of June, 1856, and has been thereby prevented from discharging his duty as one of the judges of the said Supreme Court in examining and considering the causes which had been submitted in said court, and among others, the said cause of the applicant, and prevented from taking his seat upon the bench of the said court, at the said July term thereof, in consequence of which the said term has not been holden; all which is greatly to the injury of the applicant, by hindering and delaying the consideration and determination of his said suit. He further states that he has been informed, and he believes, that the persons who hold the said David S. Terry in illegal confinement, are about to transfer and convey him beyond the limits of this State and of the United States, illegally and against his will. The application concludes with a prayer for a writ of *habeas corpus* to the persons named as having the said Terry in illegal restraint.

McAllister, J.—The principle which it is the object of this writ to vindicate, has existed from and been consecrated by a remote antiquity. It was embodied in the celebrated edict *De homine exhibendo*, of the Roman law, existed in the unwritten usages of the Saxon, and found utterance in the great charter of our Anglo-Saxon forefathers. "No freeman shall be taken, or imprisoned, or disseized of his franchises or liberties, &c., unless by the judgment of his peers, or the laws of the land." From the earliest times, says Lord Campbell, "before the *habeas corpus* act, this writ issued, calling upon the party detaining to show if any just cause existed for the detention." 2 Q. B., 342. At common law, it issued in numerous instances. In one, it was granted on the application of the secretary of a Humane Society, to bring up the body of a helpless and ignorant female, who was being exhibited for money against her consent. In another, for the body of a bastard, under fourteen years of age, to restore it to the mother. Again, it has been issued to bring up an infant who had absconded from his father, and was detained by a third person against his consent; to relieve a wife from the illegal restraint of her husband; to relieve, at the instance of her husband, a wife from illegal restraint; and, upon the application of his friends, to inquire into the legality of an impressment of a party. "It is an immediate remedy for every illegal imprisonment." 1 Watts, 67. In a word, whenever a person has been deprived of going when and where he pleases, and restrained of his liberty, he has a right to inquire if that restraint be legal, whether it be by a jailor, constable, or private individual. 2 Ashm. 247, cited in 4 Bacon, 571.

In this country, in the case of *The United States* v. *Green*, (3 Mason, 482), the common-law *habeas corpus* was issued to try the right of custody to an infant. No one will lightly impute

usurpation of jurisdiction to the great judge who presided in that case. The question before him, when he ordered the writ to issue, was one of jurisdiction. This could not have been waived even by consent of parties, as such consent could give no jurisdiction to a court of the United States, which is not conferred by the constitution and laws. If the proceeding shows a want of jurisdiction, it is the duty of the court to take notice of it, without waiting for an objection from either party. (*Cutler* v. *Rae*, 7 Howard, 729.) It is difficult even to imagine that Judge Story, through ignorance or willfulness, proved derelict to his duty. The conclusion is, that he entertained no reasonable doubt of jurisdiction, and therefore exercised it.

This great writ existed for all remedial purposes, not only anterior to the enactment of the *habeas corpus* act in England, but prior to the time of *magna charta*. In the reign of the second Charles, the *habeas corpus* act was passed to repel the aggressions of the crown and its minions. Those aggressions clothed themselves in the form of legal proceedings in the name of the crown, and hence the terms of the act were limited to persons confined on criminal process. But the *habeas corpus* brought by our ancestors as their birthright to this country, was the common-law *habeas corpus;* that great embodiment of a free principle, which, born with the sturdy Roman, preserved by the free Saxon, was so cherished by our immediate sires that they engrafted into our organic law the declaration, "that the privilege of the writ of *habeas corpus* shall not be suspended unless in case of rebellion," &c. Constitution U. S., Art. 1, sec. 9.

In the constitution of our own State, and in that of every State of the Union, a similar provision has been with jealous vigilance incorporated. Nor have the representatives of the people of this State been unmindful of the beneficial influences

of this great writ. "Every person unlawfully committed, detained, confined, or restrained of his liberty, under any pretense whatever, may prosecute a writ of *habeas corpus* to inquire into the cause of such imprisonment and restraint." (Compiled Laws of California, 167.)

In commenting upon the *habeas corpus*, the Supreme Court of Pennsylvania, in the case of *Passmore Williamson*, say, "The common law on this subject was brought to America by the colonists. .. Congress has conferred upon the federal judges the power to issue such writs according to the principles regulating them in other courts." In *Ex-parte Swartwout* (4 Cranch, 94), it is said that "for the meaning of the term (*habeas corpus*), resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law." The proposition, then, is established, both by federal and state authority, that in determining upon the nature and character of the *habeas corpus* mentioned in the constitution and judiciary act of the United States, regard is to be had, not to the limits prescribed by the British statutes, but to the more liberal principles in this particular of the common law by which it is regulated. By those principles it was issued in England to relieve any person from illegal restraint. Its operation in this country should not be less beneficent. It remains to consider to what extent the act of congress giving to the federal judiciary the power to issue this great writ has limited and controlled the cases to which, at common law, it confessedly applies. In doing so, we must bear in mind that we are fixing a construction which is to decide whether the federal courts are to extend to or withhold from persons, a great constitutional right, in many cases to which the common law applies.

No law, say the Supreme Court of the United States, pre-

scribes the cases in which this great writ shall be issued, nor the power of the court over the party when brought up by it. The term used in the constitution is one well understood; and the judiciary act authorizes all the courts of the United States and the judges thereof, to issue the writ for the purpose of inquiring into the cause of commitment. (*Ex parte Tobias Watkins*, 3 Peters, 201.) To the fourteenth section of the Judiciary Act of 1789 (1 Statutes at Large, 73), we must look for the written source of the power of the courts of the United States to issue this writ: "All the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." A doubt once existed whether the restrictive words, "which may be necessary for the exercise of their respective jurisdictions," did not limit the power to the award of such writs of *habeas corpus* only as were necessary to enable the Federal courts to exercise their respective jurisdictions in some case they were capable of deciding,—or, whether these restrictive words related exclusively to the last and immediately preceding words, "all writs not specially provided for by statute." That doubt has been dissipated by the masterly decision of Chief Justice Marshall, in *Ex-parte Swartwout* (4 Cranch, 75), in which it was settled that the words, "which may be necessary for the exercise of their respective jurisdictions," apply only to the writs referred to in the last antecedent clause, thus leaving the writs enumerated, *scire facias* and *habeas corpus*, unrestricted, save as limited by the proviso to this section. In allusion to this case of *Ex-parte Bollman and Swartwout*, Conkling, in his treatise, says (p. 77, edition of 1856), "The propriety of the latter construction, indicated by strict

grammatical construction, was demonstrated by a masterly *reductio ad absurdum;* and it was held also to be strongly corroborated by the thirty-third section of the judiciary act, which gave the power to bring up a prisoner not committed by the court itself to be bailed." It followed from this enactment, as the appropriate process to bring up the party was *habeas corpus*, that such power was supposed to have been previously given, and that the thirty-third section was therefore explanatory of the fourteenth.

After having given to the courts of the United States the power to issue writs of *habeas corpus*, the fourteenth section of the act declares that "either the justices of the Supreme Court or judges of the District Courts, shall have power to grant writs of *habeas corpus*, for the purpose of inquiring into the cause of commitment;" and the second section of the act of congress organizing this court, gives the same power to its presiding officer. (9 Statutes at Large, 521.)

Thus far the unrestricted power is given to issue the writ. By the decision of the Supreme Court of the United States this is a writ well understood; and in the exercise of the power of issuing it, the courts of the United States must necessarily inquire into its use according to the common law. (3 Peters, 200.) A restriction is interposed by the *proviso* to the fourteenth section of the act which gave the general power. It is in these words: "Provided, that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." That this *proviso* extends to the whole section, and limits the powers of both the courts and judges, there can be no doubt. Its evident object, and a most salutary one, was to prevent any

possible conflict between the Federal and State tribunals, which would result from leaving in the former the power to relieve persons confined in jail by State courts and State magistrates. Such view seems to have been taken by Judge Kane, in the case of *Passmore Williamson*, and in the same case by the Supreme Court of Pennsylvania. (Am. Law Register, October, 1855, 741.) In that case, a writ of *habeas corpus* had been issued by the district judge of the United States for the Eastern District of the State of Pennsylvania. The respondent having made an evasive return, was committed for the contempt. He was subsequently brought before the Supreme Court of the State of Pennsylvania. Among others, his discharge was moved for on the ground that the District Judge had no jurisdiction or power to issue the writ. To this objection the court say: "The act of congress of September 24, 1789, gives the court power to issue writs of *habeas corpus*, &c., and the same act expressly authorizes the judge of that court to grant writs of *habeas corpus* for the purpose of inquiring into the cause of commitment, *provided* that such shall in no case extend to persons in jail, unless where they are in custody under the authority of the United States," &c. "And it does not appear that the writ of *habeas corpus* issued for persons in jail, or in disregard of State process or authority." It was on this ground that the Pennsylvania court very justly sustained the jurisdiction of the district judge. While it is evident that the *proviso* to the *fourteenth* section, limits equally the powers of the courts and judges (admitted to do so by the court in the *Passmore Williamson* case), it by no means follows that equalizing and restricting their powers as to persons in jail, has denuded them of all powers, where they have jurisdiction of the parties, to relieve from illegal restraint, save in cases where the suffering parties are in jail under authority of

the United States. The *proviso* simply inhibits them from sending the writ to any persons in legal custody in jail, unless there under the authority of the United States. The alien, or citizen of another State, who is restrained of his liberty by lawless men, who is under no legal restraint, has a right to appeal to the laws of the country for relief. If in jail, or legal custody not under color of authority of the United States, he is remitted to those laws which placed him there. This is, in my opinion, the true construction of the *proviso*, in which I am confirmed by the action of Judge Story, and by the opinions of the District Judge of the District Court of the United States for the Eastern District of Pennsylvania, and the Supreme Court of that State. It was in the exercise of this jurisdiction that Judge Kane issued the writ in the *Passmore Williamson* case. Speaking of the common-law *habeas corpus*, he says, "The writ issues here, as it did in Rome, whenever it is shown by affidavit that its beneficial agency is needed. It would lose its efficiency if it could not issue without a petition from the party himself, or some one whom the party had delegated to represent him. His very presence in court to demand the writ, would in some sort negative the restraint which his petition must allege. In the most urgent cases, those in which delay would be disastrous, forcible abduction, secret imprisonment, and the like, the very grievance under which he is suffering precludes the possibility of his applying in person. The American books are full of cases—they are within the experience of every practitioner at the bar—in which the writ has issued at the instance of third parties, who had no other interest or right in the matter than what man concedes to sympathy with the oppressed." (4 Am. Law Register, 25.) These views are as sound law as they are eloquently expressed. In the case at bar, the applicant is an

alien resident in this place; is not only interested in the matter to the extent that man concedes to sympathy with the oppressed, but is pecuniarily interested to a large amount. He is not in jail, nor in any custody known to the law, but held in restraint against his will, and in direct violation of those laws. It is, therefore, ordered that the writ of *habeas corpus* do issue as prayed for.

A. P. Crittenden, and *D. W. Perley*, for Petitioner.

The writ was not served, the party in confinement having been released the night before the writ was to have been served.

CAMPBELL *et al.* v. STEAMER UNCLE SAM.

In Admiralty.

Circuit Court, U. S., July Term, 1856.

The libelants and respondents must recover and defend on their respective allegations and averments.

No defense to a breach of contract with the seamen can be available on the ground that the disturbed condition of the country to which the vessel was bound, authorized the breaking up the voyage, if the condition of the country was the same as it was at the time of sailing, and had been so for some time previously.

The action of the consul in the discharge of seamen in a foreign port is not conclusive upon this court. The action of that officer in this case is adopted.

This is an appeal from the decree of the District Court of the United States for the Northern District of California, in favor of the libelants.

McAllister, J.—In this case, as in every other, the libelants must recover on the allegations in their libel; and the respondents must rely exclusively on the grounds they have selected in their answer. Such is the rule recognized by the Supreme Court of the United States in *Rich* v. *Lambert* (12 Howard, 347.) The rigid enforcement of this rule is important in order to prevent surprise to either party.

The allegations of the libel are, that the libelants shipped on board the "Uncle Sam" as seamen, signed shipping articles, and in pursuance thereof entered on board the said steamer on a voyage from San Francisco to San Juan del Sur; that on the 5th day of April, 1856, the "Uncle Sam" started from San Francisco on her proposed voyage, and instead of going to her destined port, she was carried into the port of Panama, where she arrived on the 20th day of April, 1856; that on the 24th day of May ensuing, the libelants were discharged by the United States consul at Panama, under the provisions of the act of congress in such case made and provided, and certificates of discharge given to libelants, who subsequently worked their way from Panama to San Francisco. It further propounds, that libelants were entered on the crew list of the "Uncle Sam;" that no portion of the *extra* wages awarded by the consul have been paid, and that libelants are entitled to two months' *extra* pay, besides the wages due them up to the time of discharge, and twenty per cent. on the two months' *extra* wages, according to the acts of congress.

The answer admits the shipment by the libelants, their signature of the shipping articles, the departure of the steamer at the time and on the voyage mentioned, the arrival of the vessel at Panama, and the discharge at that place of the libelants by the consul. It admits, that the voyage stipulated for

was not performed, and defends the breach of contract on two grounds: *first*, the distracted condition of affairs and the military movements in Nicaragua, to a port of which country the vessel was originally destined; and, *second*, that the libelants were not entitled to their discharge, that they were discharged against the consent of the master, and that the proceedings of the consul in giving such discharge were not only illegal but fraudulent and covinous.

The question arising out of these pleadings is, whether the discharge of the seamen at Panama under the circumstances was legal. In relation to the disturbances at Nicaragua, on which the first ground is specially based, and which in substance is the foundation of the whole, the evidence ascertains that intermediate the starting of the steamer from San Francisco on the 5th of April and her arrival at Panama on the 20th, no change in the condition of things in Nicaragua as they existed at the former date had taken place. I agree in the conclusions of the district judge on this point: "If the convenience or the interests of the claimants induced them to make a change in the voyage for causes which did not fortuitously arise in the course of it, but existed before it commenced, I am unable to perceive on what principle the seamen can be held to a service essentially different from that which they contracted to render;" and, again: "The facts in this case abundantly show that the original voyage was broken up, and the contract with the seamen was dissolved."

Such being the conclusion, the court must consider that, released by the breach of the contract by the claimants, the seamen were entitled to their discharge according to the general principles of the law merchant, without the intervention of the consul at Panama. The acts of congress on this

subject are cumulative, made for the protection of seamen, and with a view to afford them a prompt remedy; certainly not to withdraw them from the protection of the courts. Whatever had been the action of the consul, or the form of his certificate,—whether legal or illegal, regular or irregular,—it could not be conclusive upon this court, nor shut its door upon the libelants.

In *Hutchinson* v. *Coombs* (Ware, 65), it is laid down that the certificate as to the discharge of a seaman will not preclude the court from inquiring into the cause of his discharge, and awarding damages if his discharge was unjustifiable. Whether the law under which the consul acted be constitutional or not; whether, if constitutional, the conduct of the consul was in strict accordance with it; whether his action was honest, or, as is alleged,—covinous, are not the subjects of inquiry. The question is, "Were the libelants entitled to their discharge?" After the breach of the contract by the claimants, and the detention of the libelants, arising out of that breach, for upwards of a month at Panama, I consider them entitled to such discharge.

It is proper to dispose of two objections urged by the proctor for respondents. It is urged that there is error in the court below in permitting the discharge of libelants at Panama by the certificate of the consul, which is not made evidence by law.

A threefold answer may be given: *first*, it appears by the judge's notes on file that libelants proffered to establish their discharge by parol testimony, that respondents objected to its competency, and, upon their motion, it was ruled out by the court; *second*, no exception was taken in the court below to the admission as evidence of the consul's certificate; and

third, the exhibit "A" annexed to the answer, being the protest of the master, expressly admits the discharge, and only insists on its irregularity.

The second objection is, that there is no proof that the libelants were designated in the crew-list, as prescribed by law. Now, the allegation that they were so designated is made in the libel, and there is no denial of it in the answer. The crew-list is a document the possession of which the law fixes in the master. The silence of the master and of the respondents,—the one in his protest, the others in their answer,—is significant as to a fact presumed to be peculiarly within their knowledge. Not intending to assert as a rule that all allegations in the libel not denied in the answer are to be taken as true, the court considers, where there is silence or evasion in answers in relation to a particular fact supposed to be peculiarly within the knowledge of the responding party and which is alleged in the libel, that in such case it is within its discretion to take such fact *pro confesso*. In the exercise of such discretion the court will look carefully to the other facts proved in the case. In addition to the silence of the parties, I find, by looking at the judge's notes, that no objection was taken in the court below on this point; and in the protest of the master, filed in the cause, a minute enumeration of the reasons and causes for protesting is given. Among them, no intimation of the paper is given, the production of which, if libelants had not been properly designated on the crew-list, would have been one of the causes relied on as proof of the irregularity of the discharge and assessment of damages. The court cannot consider the second ground taken as tenable.

As to the measure of damages: A uniform rule in cases like the present has been established by the legislation of

congress, was acted upon by the consul, and by the district judge in this case, and which this court regards as correct.

The decree of the District Court of the United States is hereby affirmed, and a decree will be accordingly forthwith entered.

Glassell & Leigh, for appellants.
Crockett & Page, for respondents.

STEIN *et al. v.* GODDARD *et al.*

Circuit Court, U. S., July Term, 1856.

The infringement of a patent is a *tort;* but as the wrongful act is not committed with direct force, the form of action is that description of *tort* called *trespass on the case.*

Held—The assignees of a patent, though it is conveyed to them in separate, undivided parts, may all join at the time of the infringement with the holders of the title, in an action for the recovery of damages for an infringement of the patent.

This action was brought to recover damages for the alleged violation of a patent. The plaintiffs sue as assignees of the patent for the State of California. A *demurrer* was filed by defendants; and the ground on which it rested was, that the complaint or declaration showed upon its face that the assignment of the patent to the plaintiffs is for separate interests, one undivided third part being assigned to one, and two undivided third parts to the other plaintiffs.

McAllister, J.—It is argued that the interests of the plaintiffs as assignees being separate, they cannot maintain a joint action. This is the sole ground on which the *demurrer* rests. To sustain it, reference has been made by counsel for the *demurrer* to various authorities collated in 1 Chitty's Pleading, 10. These cases affirm the familiar principle that in actions arising *ex contractu*, where the legal interest and cause of action of the covenantees are several, each may and should sue separately for the particular damages resulting to him individually. This principle and these authorities do not apply to the case at bar. Here, the legal interest is joint. The quality of the interest is not destroyed or affected by the quantity in which it is distributed. The whole joint interest in this patent for the State of California is in the plaintiffs, and for an injury to that interest they may sue jointly. The authorities cited apply exclusively to actions *ex contractu*, and have no application to this action, which is not brought on a joint contract, but founded on *tort*. The infringement of a patent is a *tort;* but as the wrongful act is not committed with direct force, and the injury is the indirect effect of the wrongful act of the defendant, the form of action is that description of *tort* called trespass on the case. (Hindmarch on Patents, 252.)

The cases which do apply to the present, are to be found in 1 Chitty's Pleading, 113. These assert the principle that "when two or more persons are jointly entitled, or have a joint legal interest in the property affected, they must in general join in the action, or the defendant may plead in abatement, and though the interest be several, yet if the wrong complained of caused an entire joint damage, the parties may" &c.

If there could be any doubt on this point, it is dissipated

by authority. Hindmarch (On Patents, p. 252) tells us, if a patent has been assigned in several shares, all the assignees may join in bringing an action; and it is conceived it makes no difference whether the title of the several assignees accrues to them by only one or several deeds. In *Whittemore v. Cutter* (1 Gallison, 429), a joint action for the violation of a patent was sustained, which had been brought by the patentee and his assignee. "The statute (say the court) gives to the assignee all the right and responsibility which the original inventor had in the undivided portion of the patent which is conveyed; and an action may well be maintained by all the parties who at the time of the infringement are the holders of the title."

In the case at bar, the plaintiffs allege themselves to be the owners of the whole title and interest in the State of California; and this is admitted by the defendants' pleading.

The demurrer in this case is hereby overruled, and an order will be entered accordingly; and it is further ordered that defendants pay costs, which shall be entered in the order overruling the demurrer.

Shafter, Park & Shafter, for plaintiffs.
Crockett & Page, for defendants.

BAYERQUE *v.* THE JACKSON WATER COMPANY.

Circuit Court, U. S., July Term, 1856.

When orders and a final decree have been taken in a case pending in a court of equity, in vacation, without the sanction or knowledge of the chancellor, the proceeding, including the decree, will not be set aside on summary motion.

When all the proceedings taken were in strict conformity with a written stipulation entered into by the parties, and filed in court, and there was no mistake or fraud, and moneys have been paid and received by the respective parties on the faith of the decree, and the property has changed hands, the proceedings are at least only voidable, not void.

If injury has accrued to a party, he must file his bill and bring the whole case on its merits before the court, so that a decree may be rendered on terms doing justice to both parties.

A motion was made in the case to set aside, or so amend a decree as to render it unavailable to the complainant.

The circumstances disclosed by the record are as follows:— On the 26th February, 1856, process was served upon defendant. On the 3d March ensuing, an order upon motion was made, appointing a receiver, who gave bond and security. On first day of April ensuing, the bill was amended by adding new parties. On 23d day of April, 1856, a stipulation was entered into between the parties, in writing, and filed in the cause on the same day.

Among other things it was agreed, that in addition to the sum of money to recover which this bill of foreclosure was pending, there should be added at the reference, which it was stipulated should take place, any and all sums of money paid or advanced by complainant at the sale of the works of the said Jackson Water Company, by virtue of a certain judgment

against the said Company, obtained in Amador county in this State; that the said sums of money should bear the same rates of interest, and be entered into the final judgment in this cause on the same terms, as the amount due on the mortgage to foreclose which this bill was instituted, the interest to accrue from the date of the advances; and the certificate of sale by said sheriff should be conclusive as to the amount advanced by complainant on said sale, and said amount should be entered by the master in his report.

Such stipulation further provided, that complainant might enter in the final decree afterwards to be filed, in addition to all foregoing sums of money, the sum of one hundred and seventeen thousand five hundred and nine dollars, twenty-four cent; and that said master was authorized to insert in said decree said last mentioned sum of money, upon said terms, and to bear same interest as the amount due in said mortgage.

It was further stipulated there should be entered in such decree all and every sum or sums of money that have been already paid, or may hereafter be paid by complainant on account of the said Jackson Water Company on account of taxes; such sums of money to bear interest from the date of the several payments thereof, at the same rate as the money due on said mortgage; and the said master was authorized to enter up the same in his said report and the final decree in this suit.

It was further stipulated and agreed, that *upon the filing of the stipulation*, the bill of complaint should be taken *pro confesso*, and final decree in this suit should be entered in accordance with the prayer of the bill and this stipulation. And, lastly, it was agreed that defendants have six months, from the date of the final decree and sale, to redeem the mortgaged premises.

A literal compliance with the provisions of this stipulation

took place. On the 24th April, 1856, the bill was dismissed as to all the defendants save the present defendant, the Jackson Water Company.

Against them the bill was taken *pro confesso*, and an order taken referring the whole matter to a master in equity. On his report, a final decree was entered in the clerk's office; also an order confirming the report of the master, and ordering a sale of the property.

The decree was enrolled, and on the 7th July, 1856, by virtue of said decree and order, the mortgaged property was sold and purchased by complainant for the sum of one hundred and ninety-six thousand dollars.

Lastly, at a term of this court, upon the presentation of the stipulation, orders, and decree, an order was entered confirming the sale of the mortgaged premises. Every provision of the stipulation was complied with by the complainant.

In March, 1856, the defendant, by his solicitor, moved to set aside the orders and decree made subsequent to 3d March, 1856, on the ground that they were all taken in vacation (with the exception of the decree of 2d September, 1857, confirming the sale), in the clerk's office, although purporting to bear date in term-time; which motion was denied, and which motion is renewed at present term.

McAllister, J.—This is a motion to set aside a decree made by consent of parties in this court, on the ground that the orders which preceded it and the decree itself, were taken in vacation, although bearing date in term-time.

It is true that there was no judicial action by the court in relation to such orders, save the signature of the judge to the final decree, and the order confirming the sale. After the return of the judge from a temporary absence from the city,

upon a presentation of the documents on file in the case, the said decree, dated as of the preceding term, was signed by him, and an order confirming the sale. To ascertain the condition of the case at that time, it is necessary to fix a construction upon the written stipulation. It provides, that upon its being filed certain proceedings should take place. In strict conformity to this agreement, the complainant acted, he took the bill *pro confesso*, and pursued all the other steps prescribed.

But what is more important than the conduct of complainant, is that of the defendants. On this motion the following facts are established by affidavits, and stand uncontroverted. That complainant, after promptly taking all the steps prescribed by the stipulation, relying on said stipulation, orders, and decree, paid to defendant, who received the same, the balance of the sum stipulated to be paid in agreement, and entered by virtue thereof into and forming a part of the decree, the sum of $117,509 34 over and above the amount mentioned in the mortgage. That said sum was paid immediately after the entry of said decree, and same was accepted by the defendant with full knowledge that said decree had been entered, and that the money so received by defendant was paid by complainant relying upon the said decree. That no portion of the moneys paid has been refunded. That defendant has become insolvent. That, although the time has expired within which by the terms of the stipulation, the defendant has a right to redeem, the complainant is willing to convey to defendant all the property he (the complainant) holds under the master's deed, on being reimbursed for the moneys advanced by him, on the faith of the stipulation and decree.

Now, if it be assumed, that all the proceedings in this case

were irregular and voidable, the utmost this court could do on a bill filed to set them aside, would be just what the complainant proffers to do.

But defendant asks this court, on a motion summarily to set aside the decree, and sale of the property, and leave it together with the purchase-money paid to the defendant in the possession of latter. The court would be lending itself to the propagation of a gross fraud, did it do so.

Another fact is developed on this motion, which is uncontroverted. It appears, that one James Creighton, on 12 Sept., 1856, subsequent to the proceedings and sale in this case, obtained a judgment against the defendant for the sum of $39,000 in the District Court for the fifth judicial district of this State. That the claim on which said judgment was recovered, was a claim assigned to said Creighton by one John C. Harn, who was father-in-law of said Creighton, and the President and one of the Trustees of the said Jackson Water Company, and who, as such, signed the said stipulation upon which the said decree was entered. That a suit was commenced in said court in August, 1856, which was discontinued. That a second suit was commenced on the same demand, and summons served upon the said John C. Harn, President of said Company, and no answer having been filed, judgment by default was taken. Various charges of fraud are made, growing out of this transaction, with which on the present motion this court has nothing to do; it can only look to the facts as alleged in the bill and set forth in the affidavits.

In view of these facts the inquiry is, whether this court has the power to set aside the decree of this court on summary motion; and if it has the power, is this a case which calls for its exercise?

Now, there is no positive or actual fraud suggested in this case. There is nothing to indicate anything further than can be inferred of a constructive fraud derived from the fact that the proceeding did not receive judicial sanction. It is not pretended that the terms of the written stipulation were not in good faith carried out by the complainant. It is not denied that he paid all the money he was legally bound to do; that said payments were made by him relying on the stipulation and the decree; that defendant received the moneys with full knowledge of the transaction, and the reliance placed upon it by the complainant. In view of all these facts, it is insisted that this court upon this motion should set aside the decree, or so amend it as to render it inoperative for all the purposes for which it was agreed on by the parties to be rendered. The practical result of which is to leave the property, and the money which complainant has paid for it, in the hands of defendant.

Such is not the mode in which a court of equity administers justice. Equity always sets aside a deed upon other grounds than positive fraud on the part of the holder of it upon terms, and requires a return of the purchase-money, or that the conveyance shall stand as security for its payment. This constitutes the essential difference between relief in equity and that afforded in a court of common law. The latter can hold no middle course. The entire claim of each party must be determined at law on the single point of the validity of the instrument; but it is the ordinary case in the former court that a deed, or decree, not absolutely void, yet under the circumstances inequitable as between the parties, may be set aside on terms. (*Coiron et al.* v. *Millaudon et al.* 19 Howard, 113.)

In this case, so far as the facts appear on this motion, the

court can see nothing but irregularity. If on that ground it shall be deemed good cause for setting aside the proceedings, it must be done on terms just to both parties. This can only be done on a bill filed bringing the whole case upon its merits before the court, when equal justice may be done between the parties.

The motion must be denied.

Parsons & Ganahl, for complainants.
H. P. Irving & T. Wise, for defendants.

CRAIG, *Appellant*, *v.* STEAMER "HARTFORD," *Appellee*.

In Admiralty.

Circuit Court, U. S., July Term, 1856.

A decree final in other respects, is not converted into an interlocutory one because it directs a taxation of costs.

A DECREE was rendered by the court in this case, on the 25th October, 1856. No appeal having been perfected within ten days after the decree rendered, execution has been sued out. A motion is now made to stay the said execution, and arrest all proceedings thereon, upon the alleged ground that the said decree was an interlocutory, and not a final one.

MCALLISTER, J.—Three positions are taken to sustain this motion:—

1st. That the decree provides for the entry of a judgment, and does not decree that a judgment *be* entered;

2nd. That the decree directs a taxation of costs;

3d. That the costs in this case have never been taxed.

The practice of the District Court of the United States for this district, and of this court, has invariably been to award execution against stipulators in a bond, without the previous service upon them of a rule *nisi*. I see no reason to depart from that practice, left, as it seems to be, by the authorities, to the discretion of the court. But it is urged that, whatever may have been the practice of the court on this point, the decree in this case, instead of declaring that judgment *is* entered, directs that judgment *be* entered, and therefore the decree is not final. In drafting the decree it certainly would have been proper to have used the word *is*, instead of *be*. I cannot consider the error such as converts a final into an interlocutory decree. If it has that effect, the appellant has no standing in this court. He has treated the decree of the court below, precisely similar in language, as final, and has appealed from it as such. Its language is, "That a summary judgment *be* entered against the stipulators." Now, no appeal can be prosecuted from that court to this, save upon a final decree. It is by treating that decree as such, the appellant is in this court; and if the substitution of the word *be* for *is*, converts a final decree into an interlocutory one, this appeal must be dismissed.

More than ten days having elapsed since this decree was rendered, the party is entitled to execution, unless the decree is to be deemed interlocutory because it directs a taxation of costs. It is contended that such decree does not become final until such taxation shall have been made. The act of congress (2 Statutes at Large, 244) prescribes that appeals shall be from all final decrees and judgments, where the matter in dispute exceeds two thousand dollars, exclusive of costs. This excludes the idea of costs forming any portion of the decree appealed

from. In fact, costs, as to the amount of them, are not subject to the revision of the Supreme Court, and are left to the discretion of the court below. (*Canter* v. *Am. Ins. Co.*, 3 Peters, 307.)

An appeal which finally disposes of an amount equal to two thousand dollars, would seem to be a final decree that can be carried up without reference to costs. The case of *Sizer* v. *Many* (16 Howard, 102), is applicable to this point. That case was carried to the Supreme Court; and the judgment had no costs inserted in it. It was treated as a final judgment, for the court acted on it, and it was confirmed; there being a division of opinion in the court. Such division was not, however, on any question as to the final character of the judgment. After the affirmance, a mandate was sent down, and the court below permitted the costs to be inserted *nunc pro tunc*, as part of the original judgment. From this action of the court, a second writ of error was prosecuted, and a motion made to dismiss the cause for want of jurisdiction on other grounds, and the order of the court below in relation to the costs, was sustained. On this point, the court say, "But as the question raised in this case may often occur in the Circuit Courts, and it is important that the practice should be uniform, it is proper to say that we consider the decision of the Circuit Court, allowing those costs to be taxed after the receipt of the mandate from this court, to have been correct and conformable to the general practice of the court." (16 Howard, 104.)

The proctor for appellant does not in his brief deny that the Supreme Court would entertain jurisdiction of an appeal from the decree in this case, which he admits "to be final and appealable in its nature and subject-matter." This admission seems to be conclusive on the point; for, if they would do so, it would be on the ground that the decree was final. They could not do so if the decree were interlocutory.

It is urged that the true and only question is, whether the plaintiff is in a condition to sue out an execution. True; but, so far as the question concerns the character of the decree, it resolves itself into the inquiry, Is the decree final or interlocutory? If final, then the party is not prevented from suing out his execution on the allegation that he has sued it out, or is about doing so, within ten days after the rendition of an interlocutory decree.

If he has done so irregularly, by not having given notice of taxation, or by no taxation of costs, such fact cannot change the character of the decree in connection with the appeal. If it was final originally, it does not cease to be so by any irregularity in the mode of issuing the execution. The question, however raised, to "this complexion must come at last." Was the decree in this case interlocutory because it embodied a direction for the taxation of costs, and could not, as alleged, become final until such taxation had taken place? The argument urged is, that a final judgment cannot be deemed to have been rendered unless a previous taxation of costs had taken place. But the Supreme Court says, in the case previously cited, "the costs are, perhaps, never in fact taxed, until after the judgment is rendered; and, in many cases, cannot be taxed until afterwards."

Now, if the costs are not to be necessarily taxed before judgment, and sometimes have necessarily to be taxed afterwards, the final character of it is not changed by taxation; and surely a direction in the judgment, for a taxatiou of costs, will not convert it into an interlocutory proceeding. If a judgment rendered before taxation of costs be not final, we must impute usurpation of jurisdiction to the Supreme Court; for we have seen that they have exercised appellate jurisdiction over a decree which was not final, if the proposition con-

tended for be sustained. It is true, as asserted by proctor for appellant, the chief justice speaks of the omission to insert in the judgment any amount of costs as the result of "oversight" or "mistake;" but if the irregularity had been such as to prevent the court from recognizing the decree as final, they could not have taken jurisdiction, for *it* depended upon the final character of the decree.

A decree is final for the purposes of an appeal when it is in a condition to be executed without further proceedings therein in court. Unlike a reference to a master, referee, or commissioner, whose action must receive the confirmation of the court, the taxation of the costs is a ministerial act, and no proceedings thereon in court is had. If the taxation be erroneous, a re-taxation, under the direction of the judge, by the clerk, can be obtained; but the misconduct of the clerk cannot affect the original character of the decree. Considering it final, ten days having elapsed since the rendition of it, the act of congress interposes, and it is out of the power of this court to prevent the plaintiff from suing out his execution.

The third and last ground taken in support of this motion, is, that there has been no taxation of costs. That circumstance cannot convert a final into an interlocutory decree. The appellant might at any time have obtained a taxation; and if one had been irregularly made, he had his remedy. Independently of any written rule, according to the general practice of the court he could have excepted to the taxation. This right, and the manner in which it is to be exercised, is embodied in Rule 159 of the District Court of the United States for the Southern District of New York; the rules of which court are adopted by this, where not inconsistent with its written rules. By that rule, it is provided that if costs be taxed without notice, they shall be subject to re-taxation at the

cost of the party obtaining the taxation. The failure to obtain taxation cannot operate as a *supersedeas*. The perfecting of the appeal can alone, under the act of congress, so operate, where the decree is, as in this case, final. The taxation of costs is a step out of court, for the mere purpose of ascertaining the amount.

In *Jackson* v. *Varick* (7 Cowen, 412), the court say, "The omission to give notice to tax costs, never affects the regularity of the judgment." "The only consequence of the omission of notice to tax, is a re-taxation at the expense of the party." 2 Wendell, 244. In *Field* v. *Partridge* (14 Eng. Law and Eq. Rep. 356), a motion had been granted to set aside an execution for the want of notice of taxation of costs. A rule *nisi* was obtained, to show cause why such order should not be rescinded. All the barons agreed to do so. Pollock, C. B. says, "The omission to give notice of taxation, does not render the judgment and execution irregular." It is admitted that a party may recover a judgment and take out execution for what he has recovered, which shows to that extent the judgment is right. The court must correct any error that has been introduced; but the execution ought not to be set aside.

In view of foregoing authorities, and of the reason of the thing, I conclude, *first*, that the decree in this case is final; and, *second*, that any irregularity in the taxation of the costs, or the omission up to this time of any taxation, can be corrected or supplied before the clerk, under the direction of the judge at chambers, and cannot affect the decree, which, final when rendered, continues so.

The motion made to stay the execution, and arrest all proceedings under it, must be and hereby is denied.

William Barber, for appellee.
John V. Watson for appellant.

BAYERQUE *v.* HALEY AND THOMPSON.

Circuit Court, U. S., July Term, 1856.

An averment of citizenship equivalent in import to a direct allegation, is sufficient to give jurisdiction.

The doctrine at common law that the deed of a *feme covert* is void, does not apply to this case. The proceeding is for foreclosure of a mortgage. Until foreclosure it is a *chose in action*. Endorsement of note and assignment of mortgage by the husband alone would have been sufficient.

The act of the legislature of this State of 17th April, 1850, as to "husband and wife," has no application to this case, the parties having been married out of this State, and never having been within her limits.

Bills of exchange and promissory notes constitute an exception to the rule that *choses* in action of the wife, other than chattels real, are assignable only in equity.

In this case a bill was exhibited for the foreclosure of a mortgage, to which a *demurrer* was filed. The grounds assigned are given in the opinion of the court.

McALLISTER, J.—The first ground taken in support of the *demurrer* is, that the averment of the citizenship of Samuel Moss, jr., is not sufficiently made to give jurisdiction to the Court. It is in these words: "That the said Samuel Moss, jr., during his lifetime was a citizen of the United States and of the State of Pennsylvania." Although this averment might have been made with more precision, it still must be deemed sufficient. If during his life he was a citizen of Pennsylvania, the idea that he was a citizen of this State at the time of the commencement of this suit is excluded. The averment is equiva-

lent in import to an averment of citizenship in Pennsylvania in more direct terms. In the case of *Gassies v. Ballon* (6 Peters, 761), the defendant was represented as "now residing in the parish of West Baton Rouge, where he caused himself to be naturalized an American citizen." On the ground that such description was of equivalent import to a more direct and precise averment, the description was held sufficient. At all events this case cannot be permitted to go off on that ground, for if decided against the plaintiff he would be permitted to amend *instanter*.

The second ground of *demurrer* is the principal point. It is, "that it appears by the bill that the complainant derives title to the note and mortgage set forth, by virtue of a certain instrument of assignment executed by one Zoë Mouroult and her husband, one P. L. Lefevre, by one Lucien Hermann, their attorney in fact duly constituted, when in law the said Zoe Mouroult, being a married woman, has no power to constitute an attorney, either with or without her husband, for that purpose, and that no title or right can be derived through such an assignment, and therefore complainant is not entitled to the relief prayed for."

The transaction to which the assignment refers claims attention. To secure the payment of certain moneys advanced by Zoe Mouroult, the wife of Pierre J. Lefevre, the defendants Haley and Thompson, in consideration of the sums of money received by them, on the 14th day of January, 1854, made and delivered their joint and several promissory note for the sum of $12,000, payable to the order of the said Zoe, the wife of the said Pierre L. Lefevre, in the sums and at the times mentioned in said note. To secure payment of the same, defendants at the same time executed and delivered a deed of mortgage to the said Zoe, her heirs and assigns. Subsequently, the

said mortgagee and her husband, the said Pierre L. Lefevre, by their attorney, the said Lucien Hermann, for value received, assigned, sold, and transferred the said note and mortgage-deed to one Samuel Moss, jr., from whom the plaintiff directly claims. Now, it is urged that no interest passed to Moss, because Zoe Mouroult, being *feme covert*, could not make a valid power of attorney to Hermann. To sustain this proposition, reliance is placed upon the act of the legislature of this State, passed April 17, 1850, entitled "An Act defining the rights of husband and wife." In relation to this statute, the Supreme Court of this State have said, "We have repeatedly held that our statute does not change the relation of husband and wife, except in the particular cases expressly provided for by the statute." (*Rowe* v. *Kohle*, 4 Cal. 285.) Various provisions are made by the act of the legislature as to what shall constitute the separate property of the married woman, and what steps shall be taken to protect it. But for the purposes of this case it is only necessary to refer to the fifteenth section of the act. It extends the provisions of the law to persons who were married out of this State, and who had never resided within it. Upon the principle that *expressio unius est exclusio alterius*, it is evident that the clear intent of the act was to exclude from its operation persons who were married without the limits of the State and never lived within them. It was eminently proper to exclude those who were married without, and never came within, the jurisdiction of the State. The facts of this case show, that Zoe Mouroult was not wedded to her husband in this State, that neither of them resided in this State at the time of the execution of said note and mortgage deed, nor has either of them at any time resided therein, but both of them have always been aliens, and citizens of the empire of France. This case cannot, therefore, be brought within the operation of the act of the legislature on

which reliance has been placed by the counsel for the *demurrer*. The court has been also referred to the 2d, 19th, 21st, 22d and 23d sections of the act of the legislature of April 16, 1850, entitled "An Act concerning conveyances." The second section prescribes the mode by which husband and wife by their joint deed may convey the real estate of the wife; and the remaining sections cited all refer to the mode of such conveyance. Whether all these sections have not been repealed, it is unnecessary now to decide. It is sufficient to say, that all the sections of the law which relate to married women are confined to real estate exclusively. But it has been urged for this *demurrer* that, independently of all statutory enactments, at common law a married woman could make no deed, and her act was deemed a nullity. It is true that a married woman could by that law make no conveyance of real estate except by fine, or common recovery, or some equivalent act of record. The proceeding by fine or common recovery never prevailed in this country. A common law grew up, which became a rule of property, by which a joint conveyance by husband and wife was held to pass the property conveyed. Then came statutory enactments in different States, providing for the security of married women by requiring from them examinations and acknowledgments separate and apart, when they joined in conveyance with their husbands. Such is the law in the different States. But in the view the court takes of this case, the doctrine that at common law the deed of a *feme covert* is void, does not touch it. The bill is filed to foreclose a mortgage to recover the payment of the note. Until foreclosed, the mortgage, as well as the note, is a mere chose in action; and the endorsement of the note and assignment of the mortgage by the husband alone, and his delivery, would be sufficient to transfer the interest, without the signature of the wife. A debt was due to the wife, a chose in

action,—*debitum in presenti, solvendum in futuro.* A bona-fide assignment for valuable consideration of this debt by the husband, divests in a court of equity the interest of the wife.

In the case of *Cassell* v. *Carroll* (11 Wheaton, 134), an agreement was entered into by certain parties; and among them was John Browning, the husband of Louisa Browning, and the committee of Louisa Browning, wife of John Browning, she being at the time a lunatic. By the agreement, certain quit-rents belonging to the wife were to be surrendered. It was contended that John Browning, the husband, as such, could not convey the title to these rents belonging to his wife, so as to bar her, in case of survivorship, from the right of recovery; and, she being a lunatic, no act done by her committee could affect her. In relation to these rents, the court say, "They were not future, contingent, or reversionary interests vested in her. How far, in respect to such interests, the husband or the committee of a lunatic is by law authorized, by a conveyance or assignment, to dispose of her rights, is a question which we are not called upon to decide, and upon which we give no opinion. The case here is of choses in action actually due to the wife. . . . It does not appear to us that it has ever yet been decided, that a bona-fide assignment for a valuable consideration, made by a husband to a third person, of a debt actually and presently due to his wife, does not divest, in equity, the title of the wife. (11 Wheaton, 151.)

By the terms of the mortgage-deed in this case, it is provided that the whole amount of principal shall be deemed due, in case failure be made in the payment of any part of the interest as it shall grow due. The absolute sale, *bona fide*, of such a chose in action by the husband, amounts to a reduction of it into his possession. He has a qualified interest in the choses in action of his wife, as well as in her real chattels; but if he do

not reduce them into possession during life, they survive to her. The difference between the two is, the chattels real are assignable at law; the choses in action, with the exception of bills of exchange and promissory notes, are assignable for valuable consideration, and the transfer will be sustained in equity. (Clancy's Rights of Married Women, 109, 110.) The husband may bar the right of survivorship in the choses in action by a release. Thus he may release any wrong done or promise made to her alone, or to her and himself during marriage. He may discharge his wife's bond; as, also, not only the debt actually due, but even that which is not payable till a future day. So he may release any right or duty that may possibly accrue during marriage. Again, if the husband reduce his wife's choses in action into possession, her right is barred. And there are various acts of his falling short of a reduction into possession, which are deemed equivalent to it; as, if a husband alone, or with his wife, authorized a third person to receive her chose in action, who accordingly receives, the right of the wife is barred although the avails never reach the husband. (Clancy, 111, 112.) And where, on a bond executed to the wife, the husband gave a letter of attorney to another to receive, and who did receive it, the wife died, and then the husband deceased,—*Held*, the action was properly brought by the executor of the husband. (*Ibid.*)

In the case of *Bates* v. *Dandy* (2 Atkins, 207), where the husband was entitled, in right of his wife, to two mortgages, borrowed a sum of money from A, and agreed in writing that he had left them with plaintiff, and that he would assign them to him forthwith, the husband died before making the assignment. On a bill to foreclose the mortgages, it was insisted on the part of the wife that they were choses in action, and that not having been assigned by her husband, they survived to her.

Lord Hardwicke held that the husband, being entitled to the trust of these mortgages, had the power to assign them for his own use, and that leaving them with the plaintiff, and promising that he would procure them to be assigned, amounted to a disposal of them for so much as to satisfy plaintiff's demand, but no more; for although he might have disposed of the whole in the manner he did, his intention was only to secure the plaintiff's debt, which being done, they belong to the widow as her choses in action. (Clancy, 121.)

The correct rule deducible from the authorities is, that where the assignment by the husband is voluntary, without consideration, it will not bind her right should she survive him; but where the transfer is for a valuable consideration, the purchaser takes the interest assigned discharged from the wife's right of survivorship.

Again, we have seen that bills of exchange and promissory notes constitute an exception to the rule, that choses in action of the wife, other than chattels real, are assignable only in equity. Now, in this case, the note having been made payable to a married woman, the endorsement by the husband would effect a legal transfer, inasmuch as the note became his property. (*Shuttlesworth* v. *Noyes*, 8 Mass. 229.) As the joining of the wife was not indispensable to transfer the interest, it is useless to discuss the right of a married woman to execute a deed or other instrument under seal. The *demurrer* must be overruled.

Parsons & Ganahl, for complainant.

J. B. Haggin, for defendants.

McGUIRE AND PLACE *v.* THE STEAMSHIP "GOLDEN GATE."—*In Admiralty.*

Circuit Court, U. S., July Term, 1856.

THE owners of a ship are liable for the *torts* of the master, when they involve a breach of the passenger contract, and are done while acting strictly within the scope of his employment.

The rule of damages in such cases, where recovery is sought on the constructive consent of the owner, must be the actual damages incurred; being innocent of any participation in the *tort*, the damages are not to be made punitive.

This is a proceeding *in rem* for a violation of a passenger contract, arising out of the *torts* of the master and mariners of the ship. Exceptions were taken to the jurisdiction of the District Court of the United States for the Northern District of California, where the libel was filed. The exceptions were overruled by that court, a decree rendered against the respondent, and an appeal prosecuted to this court.

McALLISTER, J.—As to the power of this court to entertain jurisdiction of a proceeding *in rem* for the *torts* of a master, I feel considerable doubt. That the owner is *civiliter* liable for all violations growing out of the crimes of the master or mariners, will not be asserted. Yet, it is difficult to suppose a crime committed upon a passenger by a master or mariner, which will not involve a breach of the passenger contract. There must be some limit to the owner's liability; but it is not easy to fix a uniform one. There is no case which has drawn such

line with accuracy; but the owner's responsibility is limited only by general definitions. An inquiry into the authorities will, I think, show that no case has gone to the extent of sustaining a proceeding *in rem* for the commission of a crime by a master or mariner, on the ground, solely, that it was a violation of the passenger contract. That there has been a gross violation of the contract in this case, is proved by the evidence; that the obligations of that contract are all that Judge Story has described them to be, in *Chamberlain* v. *Chandler* (3 Mason, 242), which was a proceeding *in personam* against the master, is undoubtedly true. But the question is, whether the liability of the owner is commensurate with the crimes of all in his employ on board his ship, which involve a breach of the passenger contract; and, if not, where is the limit? Certain authorities have been cited by the proctors for libelants. The case of *Marshall* v. *Bazin* (7 N. Y. Legal Obs., 342), was a proceeding *in rem*, it is true; but the cause of the action was one purely of contract,—the failure to carry the passenger after having stipulated to do so. The case of *Chamberlain* v. *Chandler*, was a proceeding *in personam*, and does not touch this question. In *Sherwood* v. *Hall* (3 Sumner, 128), the principle affirmed is, that the owner is liable where the master shipped a mariner who had run away from another vessel under circumstances amounting to notice that the shipment was unauthorized by his father. It is to be observed, in this case, there was no breach of the peace, no indictable offense. The shipment of the minor was an act done in the course of the master's employment, for the *benefit* of the owner; and hence, the assent of the latter may have been implied. The case next cited is that of the "*Rebecca*" (Ware, 188). It applies exclusively to the lien which the merchant has on the ship for lost goods. Reference was also made to

the case of the "*Phebe*" (Ware, 263). It merely enunciates the principle that the shipper has a lien on the vessel for the due execution of the contract by bill of lading. The object, doubtless, of citing the two foregoing authorities, was to show the liability for the loss of goods by reason of the *torts* of the master or mariners; and they enunciate sound law. It may be admitted, that the reasons which lie at the foundation of the rule commend to the legislature the propriety of extending, to some extent, to passengers the rules which govern the liabilities of ship-owners as to goods; but to do so is not the province of the courts. The next case is that of *Dean* v. *John Angus* (Bee's Adm., 369), which affirms the doctrine that the owners of a vessel are liable for the wrongful capture at sea by the master, he acting under an authority from the owners to capture. The next case is that of *Dias* v. *The Privateer* "*Revenge*" (3 Wash. 262). This case would seem to militate against the proposition contended for by libelants. The libel in that case was filed to make the owners liable for damages sustained by the underwriters of certain Spanish and Portuguese vessels, for piratical acts of the officers and crew of the *Revenge*, and the question arose whether the owners of a commissioned privateer are liable, civilly, for the piratical acts committed by the officers and crew of their vessel. The court held, that where an illegal capture as prize of war was made, the owner is liable civilly; but that he is not liable for the piratical acts of the master and officers. The court say, "The liability of those to whom the libelants owe their wrongs, is admitted; their inability to make retribution, if such should be their situation, is a misfortune for which the tribunals of the country can supply no remedy. Those against whom redress is sought in this instance, did not commit, nor in any manner authorize or countenance the spoliation of which the

libelants complain. They are, therefore, equally innocent with the libelants, and are equally entitled to the protection of the court." The last decided case cited by libelants, is that of *The "New World"* v. *King* (16 Howard, 469), which simply decides that a passenger may recover *in rem* for injuries received from the explosion of a boiler, the result of gross negligence of those on board the steamer and in control of her. No one of the foregoing authorities (and they are all that have been cited), asserts the principle that by varying the form of suing for a breach of the contract, and not directly for the *tort*,—that the owner is civilly liable for the crimes of the master or mariners, because the commission of them involves the breach of a contract when committed upon the person of a passenger. The proceeding in this case is a libel against the vessel for the breach of contract arising out of assaults and batteries committed by the master and officers of the ship on two of the passengers. The 16th rule of admiralty prescribes, "that in all suits for an assault and battery on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only." Mr. Benedict (§ 309), referring to this rule, considers it as applicable only to a case where the action is technically for an assault and battery as a mere *tort;* but not applying to cases where the action is brought for breach of contract and the assault and battery constitute the *gravamen* of the action. I cannot consider this construction very satisfactory; but as it has been published for some time, and has received no contradiction from any court or text-writer, I shall act upon it for the present to the extent this case goes. I have commented more fully on the question of jurisdiction, so that, while the power of the court in this case is affirmed, this decision may not be misapprehended, or extended beyond the case at bar. "I desire that nothing which may

be said in the course of these remarks shall be extended to embrace any other case." (*Waring* v. *Clarke*, 5 Howard, 441.)

In this case, the testimony ascertains that the ill-treatment of the two passengers, the libelants, by the captain and his officers was inflicted while in the avowed preservation of the discipline and police of the ship. They were acting directly in the employment of the owners. But acting within its scope they exceeded its limits; and, in analogy to the case of *Sherwood* v. *Hall* (3 Sumner, 130),—where the owner was made liable for the abuse by the master of his authority to enlist,—the owners in this case must be made liable for the abuse and excessive use of the authority confided to them. In that case, the assent of the owner might be implied, as the master was acting at the time for the owner's benefit. It cannot be so in this case, to that extent; but upon the best consideration I can give to this case, and in view of the importance of requiring a strict liability of the owner on the passenger contract, my conclusion is, that the exceptions to the jurisdiction were properly overruled by the District Court. I should be pleased if the libelants, who are the only party who can carry this case up, claiming as they do more than $2,000, would appeal it. A decision would, in that case, be obtained from the Supreme Court, ascertaining authoritatively the liability of ship-owners for the *torts* of masters amounting to a breach of the peace, where they involve a breach of the passenger contract.

The remaining question is the amount of damages decreed by the District Court. I am aware that the district judge is well versed as to the rule by which damages are to be adjusted; but am constrained to believe, that in this case he has taken counsel from the grossness of the abuse by the master of his authority, more than that rule will permit. Ordinarily, this

court does not interfere with the amount of damages decreed by the court below. The district judge has the witnesses before him, and therefore has an opportunity of arriving at the truth, not within the grasp of this court, where the testimony is in writing. Where, therefore, no additional testimony is taken, I do not feel inclined to hastily disturb a decree on the point of damages; but where the adjustment of them depends, as in this case, upon the correct enunciation of principles, then the amount loses consideration in the importance of establishing a correct basis on which to rest their adjustment. It is admitted that the owners can only be made liable for such damages as flow directly from the breach of the contract. In an action against the perpetrator of the wrong, the aggrieved party would be entitled to recover not only actual damages but exemplary,—such as would vindicate his wrongs, and teach the *tort feasor* the necessity of reform. In an action against such, it would, in the language of the district judge, "be the duty of the court to apprise officers of ships that the crews are not on every casual disturbance to be called with capstan-bars to inflict dangerous and indiscriminate blows on unoffending passengers." In such actions, the damages may be inflamed to teach offenders their duty; but not when the proceedings are against the owners for breach of contract, who, in the language of Judge Washington, did not commit or in any manner countenance the wrong, and who, with libelants, are equally entitled to the protection of the law. Such should not be made liable beyond the amount of actual damages, uninfluenced by any considerations of punishing the act of the perpetrator on the ground of breach of contract. (3 Wash. 262, 275.)

In the case of the "*Amiable Nancy*" (3 Wheaton, 558), a libel was filed to recover damages for a marine tort. The

court say, "Upon the facts disclosed in the evidence this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. And if this were a suit against the original wrong-doers, it might be proper to go yet further, and visit upon them in the shape of exemplary damages the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of the privateer; upon whom the law has from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves adequate indemnity in case of loss."

This reasoning is appropriate to the case at bar. The owners are sought to be made liable, by a constructive consent annexed to the contract, for criminal acts of the master and mariners, alleged as the *gravamen* of the breach of contract done without their knowledge, and of which they are as innocent as the libelants. In an action *ex delicto* or *ex contractu* in such a case, the measure of damages should be adjusted to the loss proved to have been actually incurred, uninfluenced by the conduct of the real wrong-doer, who is civilly and criminally liable for his acts to the injured party.

In this case, the libelants were steerage passengers on board the *Golden Gate*. They are represented to be laboring men, without means; and have therefore filed their bill *in forma pauperis*. In relation to one of them, James McGuire, the district judge says, "He seems to have received a violent blow on his wrist, or that it has been severely strained, which prevents the muscles from being used without considerable pain." The judge proceeds to state, that the physicians assert with considerable confidence that the rigidity of the muscles will be overcome by use, and conclude that for the present he

is unable to make much use of it, and that condition must continue under favorable circumstances for a month or two. It is further stated that from the 31st day of May, when the injury was received, until the trial (a period of about three and a half months), the libelant has been practically deprived of the use of his hand; that he was a sea-faring man, and that his last employment was as mate. Now, under the rule I have endeavored to show (this proceeding being against the innocent owner, and not against the original wrong-doer), the actual loss is to be the measure of damages. Apply this rule to the case. Three and a half months intervened between the receipt of the injury and the trial. Add to these, two more months for probable loss of employment by reason of the loss of the use of his hand. We have then, five and a half months; and allowing for loss of wages at $65 per month, we have the aggregate sum of three hundred and fifty-seven dollars and fifty cents. This gives to the libelant wages for the whole period. There is no evidence as to the payment of a doctor's bill, or any other item of expenditure; still, in addition to loss of wages, there are other sources of expense, which, though not directly proved, may be inferred. To meet them, double the amount of wages, add for proctor's fees $250, and we have an aggregate of $965; which will fully cover all actual loss, and amount to compensatory damages. To this libelant, the court below decreed the sum of fifteen hundred dollars.

With regard to the other libelant, Thomas M. Place, it appears from the statement of the district judge "that he received a violent and dangerous blow, without any fault on his part." The blow inflicted no permanent injury, with the exception of a slight scar or indentation on the side of the face. "It must have caused, however (says the judge), much suffering; and he appears to have been obliged to live on liquids for

some time, from his inability to chew hard food." It is evident that the wanton act of the officer in striking the libelant, evidenced as it was by the freedom from fault of the latter, must have entered into the estimate made of the loss of libelant, which was fixed at $600. In fact, the decree is preceded by the statement "that it is the duty of the court to apprise officers of ships that the crews are not, on every casual disturbance, to be beaten with capstan-bars," &c. Now, it is most true that such notice should be given in actions brought against officers themselves; but in actions against innocent owners, while the policy of the law holds them liable for actual damages as proved, these cannot be enhanced to admonish the guilty. There was no proof of actual loss by this libelant, and perhaps against the owners he is entitled to nothing. But he received a violent and dangerous blow without any provocation given, and must have been subjected to some suffering. Seeking a money compensation from a party who had no participation in the matter, I consider $250 a sufficient amount.

I am aware that his Honor the district judge, is familiar with the distinction to which this court has alluded in the adjustment of damages; but it appears to me, on reading his opinion, that he has been unconsciously, and not unnaturally, betrayed into awarding punitive rather than compensatory damages.

A decree must be entered in accordance with the foregoing views, and handed for examination and signature to the judge.

Manchester & Hodges, for libelants.
Hall McAllister, for respondents.

BAYERQUE *v.* COHEN *et al.*

Circuit Court, U. S., July Term, 1856.

A *demurrer* admits the allegations of the bill for the purposes of a motion on the bill and demurrer.

The Circuit Courts will entertain a bill filed by one in prior possession, accompanied by title, to remove a cloud upon title.

Where a State law authorizes a party in possession of real estate to sue for a settlement of an adverse claim, the Circuit Courts will look to it in aid of their general chancery powers.

Although the laws of a State cannot affect the equity jurisdiction of the Circuit Courts, when the former afford rules as to what shall be deemed clouds on title, the Circuit Courts of equity, in the exercise of an ancient chancery jurisdiction, may remove such clouds.

This bill is filed, to remove a cloud from complainant's title, for the cancellation of a deed, and for an injunction. The bill alleges, that complainant is lawfully seized and in peaceable possession of certain real property described. That plaintiff, and those under whom he claims, derive title under a grant made by Juan B. Alvarado, at the time governor of the then territory of California, to one Manuel Garcia, under date of 10th July, 1839; and alleges that complainant, and those under whom he claims, have been in peaceable possession of the premises under said grant for a period last past of seven years and upwards. That on the 9th day of September, 1850, an act of congress was passed admitting California as a State into the Union. That at the time of said admission, the premises in dispute were above high-water mark, and had been since filled in and built upon by those under whom complainant claims. That Jackson street, on which the premises are situ-

ated, was, at the time of the admission of California into the Union, a public street of the city of San Francisco, and a thoroughfare; and the block of which the premises in dispute formed a part, was bounded by various public streets, the whole of which block had been wholly reclaimed from the waters of the bay, and built upon. That on the 18th of May, 1853, the legislature of this State passed an act, by which the governor of this State was authorized to appoint five commissioners to sell and dispose of the interest of the State to certain property therein mentioned. That in pursuance of said act, one "Hermance," and four others, were appointed said commissioners, to ascertain the extent of the State's interest in said property, and sell the same. That on the 10th of September, 1853, various persons, among them David Beck and Robert Elam, grantors under whom complainant claims, commenced an action in the Superior Court of the city of San Francisco against the said commissioners, praying that the water-mark or line through said premises, should be settled as it existed at the time of the admission of California into the Union, to fix what portion of the premises had been then reclaimed, and that said commissioners might be enjoined from selling any portion thereof. That judgment was obtained in said action; and on appeal therefrom, said judgment was affirmed by the Supreme Court of this State. That by said judgment it was decreed, that said premises (including those now in possession of complainant, and the subject of the present controversy), at the time of the admission of California into the Union, formed no part or portion of the shores or waters of the Bay of San Francisco; that prior thereto they had been reclaimed, and that the State of California had no title to the premises; and said commissioners were enjoined from selling any portion of the premises as belonging to the

State of California. That on the 1st day of May, 1855, the legislature of this State passed an act, supplementary to the previous act of 18th May, 1853, whereby the governor, secretary, and comptroller of the State were constituted a board to dispose of the interest of the State in all the property of the State authorized to be sold by the preceding act of 18th May, 1853, remaining unsold, and by it, it was provided that the said board should supersede the commissioners appointed under the previous act, from and after the time when the official term of said commissioners should expire; and that said board was authorized by said act to appoint an agent or agents to attend, from time to time, all such sales. That one Jacob S. Cohen was appointed agent of said board; that said board appointed under the last-mentioned act, were the successors of the commissioners appointed under the act of 18th May, 1853, and their powers limited and controlled by that act. That said Cohen, well knowing the premises, caused a sale of the property; and upon such sale the board, on the 10th day of October, 1855, executed and delivered a deed for the premises to two of the defendants, Calloway and Coryell, the former of whom, on the 8th day of November following, conveyed to the latter his interest in the premises; which deeds were duly recorded. That said sale was fraudulent: that the conditions prescribed by the act of 18th May, 1853, were not observed; that no consideration was paid, the said Cohen crediting as a payment the amount of a judgment held against the State, which was a nullity, as so much paid by said purchasers. That said Cohen holds an interest in said sale by and through the purchasers. That by the terms of the act of the legislature under which said sale was made the deeds given by the said board to the two co-defendants, are made *prima facie* evidence of title

and right of possession, and thus cloud the title of complainant. The bill concludes with a prayer for the cancellation of said deed, and for an injunction.

To this bill a *general demurrer* was filed.

McAllister, J.—The *demurrer* filed to the bill in this case admits, so far as the present action of the court can extend, the facts alleged. Among these are the following: the legal seizin of the complainant; his peaceable possession of the premises in dispute, by himself and those under whom he holds, for upwards of seven years; that the premises had been reclaimed from the waters of the bay, prior to the admission of this State into the Union, and had been built upon and occupied by private persons, from some of whom the complainant claims; and which premises then formed a part of the city, bounded by public streets, and were above high-water mark. The *demurrer* also admits that those under whom complainant claims have heretofore obtained an injunction against the sale of the premises in dispute, upon the ground that the same formed no portion of the waters of the bay, and that the State held no interest in them. It further admits that such adjudication was, on appeal to the Supreme Court of this State, affirmed in all respects; that under a second act of the legislature of this State, directing a sale of its interest in said premises, a sale was made, and two of the defendants became the purchasers; that Jacob S. Cohen, who was agent of the State in the conduct of said sale, and also a defendant, is interested in the premises; that such sale was fraudulent, because no consideration was paid, and the conditions of the act of the legislature, under which said sale was made, were not complied with. Lastly, that a deed to consummate such fraudulent sale was made and delivered to the purchasers.

All the foregoing facts being admitted by the *demurrer* to be true, two questions arise: *first*, whether this court has the power to administer the relief prayed for; and, *second*, whether this case calls for such relief.

By the general principles of equity jurisprudence, a party who is in the peaceable and actual possession, accompanied by title, can invoke chancery jurisdiction to remove a cloud from his title. Independently of these principles, the legislature of this State has spoken upon this subject. Section 254 of the act entitled, "An Act to regulate civil proceedings in the courts of justice in this State" (Comp. Laws Cal., 519), declares that "an action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate, or interest." In *Clark* v. *Smith* (13 Peters, 195), the principle is enunciated that, although the laws of a State cannot affect the jurisdiction or mode of proceeding in equity in the courts of the United States, they may afford rules as to what shall be deemed a cloud upon the title, and the Circuit Courts of equity may remove such clouds. The Supreme Court of this State has enunciated in several cases the doctrine in regard to the removing of clouds upon title: *Shuttuck* v. *Carson* (2 Cal. 588), *Guy* v. *Hermance* (5 Cal. 73).

In this last case, the title of the plaintiff, in a contest between different parties, was passed upon and sustained. In this case, the *demurrer* admits seizin by complainant, accompanied by a title supported by the decision of the highest judicial tribunal in this State, and by a peaceable possession of seven years; and further admits the fraud alleged in the sale under which the deed was made to defendants. It is clear that the complainant has a standing in a court of equity, and is entitled to relief.

It has been urged by defendant's counsel that the complainant should have set forth his title, as *non constat* it is legal. The answer is, that the allegation in the bill is that his seizin is legal, accompanied by title to which a reference is made, and with possession during seven years; and these allegations are admitted by the *demurrer* to be true. Nor am I aware that even in a court of law a pleader is bound to set forth his seizin in more special terms than is done in this bill. In *Christy* v. *Scott* (14 Howard, 282), the plaintiff alleged his seizin in his demesne as of fee. Defendant demurred. The allegation in the declaration was deemed sufficient; and it being admitted by the *demurrer*, the court considered defendants trespassers, and estopped from denying the title of plaintiff. The allegations, admitted as they have been, are amply sufficient to sustain the bill.

On the day of the argument of this case, a paper was filed, which has not escaped the attention of the court. It seems to be a statement of the argument on the whole case. Some of the matters embraced within it are such as would be more appropriately discussed on the trial of the case, when the issues will be raised and the facts developed by testimony.

The *demurrer* must be overruled, and costs paid by the defendants. An order to that effect will be entered accordingly.

Parsons & Ganahl, for complainant.
Bigler, Thomas & Hempstead, for defendants.

BOYREAU *v.* CAMPBELL *et al.*

Circuit Court, U. S., July Term, 1856.

WHERE defendants in ejectment show no title, they cannot depend upon the invalidity of the documentary title of the plaintiff, accompanied by possession.

Defendants in entering upon the premises in dispute, whether regarded as "vacant" or "public land," or as land acquired by the government of the United States under a foreign grant, are to be deemed trespassers.

Defendants cannot, in a general answer, avail of an objection to the jurisdiction of the court on the ground that the title of plaintiff is merely colorable.

"Rodeo boundaries," under the customs and acknowledged usages which prevailed in California, constituted as notorious evidence of the possession of land as the cultivation or fencing in an old, settled country.

This was an action of ejectment, and, a jury having been waived by the parties, was submitted to the court on the law and facts, with a reservation to the parties of the right to except to the rulings of the court in relation to the admission of testimony, as well as to the decisions made upon the law of the case on its merits.

The evidence ruled upon, and the facts testified to, are sufficiently set forth in the decision of the court, delivered by—

MCALLISTER, J.—The grant under which by *mesne* conveyances plaintiff claimed, was alleged to have been lost; and plaintiff called Juan B. Alvarado, who was governor at the time the grant was issued, and who testified that the *expediente* in an application for land, consists of the petition of the applicant, the orders for information, the decree of concession,

and a draft of the title-paper issued to the party. These documents are collected together and preserved in the archives, constituting what is termed the *expediente*. He further stated, that it depended entirely on the secretary whether he made out the title first and then copied it, or made the draft first, and then drew up the title to be signed. It was part of the mechanism of his office—that in his time it was customary to give a verbal order to the secretary to write out the concessions, and that the secretary sometimes (as in this case) made out a final title without an order of concession signed by the governor. The witness was unable to recollect an instance where the archives showed a decree of concession on a separate piece of paper, where no information was asked for, nor did he know whether any of the expedientes contained more than one draft of the title. He did not remember any case where the governor made any alteration or correction of the title as drawn up. He also stated that he recollected various instances where the concession was presented unsigned to the departmental assembly. In such cases they made no difficulty, provided it was archived. Sometimes the secretary of the assembly, or that of the governor, observed it and had it signed, to regularize the proceedings. He further stated, that it was usual to deliver the title to the petitioner, subject to the approval of the departmental assembly, and afterwards to send the *expediente* with a draft of the title to the assembly, for their approval; and that he never knew a case where the draft of the title was put in the *expediente* without the original's having been first delivered to the party, nor where, after the draft was made, the governor refused to sign and the grant was stopped. The witness then, on being shown the *expediente*, stated that he knew the first paper; that it was the original petition of Estudillo, and was in his handwriting, which

he knew. The next paper, the decree of concession, he proved to be in the handwriting of Francisco Arce, at that time first officer of the secretario. The third paper he also stated to have been written by Arce. The writing on the *desino* or plan, he stated to be that of Fernandez, an ancient alcalde of San Jose. He added, that he recognized all these papers as the original documents on which the title issued; and that the plan was not presented by the petitioner, as he was already in the possession of the land, but was made by the prefecture in pursuance of his (witness's) orders, and as a means of obtaining information, and to enable him to decide a dispute between Estudillo and Guliellmo Castro as to boundaries. That, on receiving the map, he called the parties together; but being unable to bring them to an amicable settlement, he sent for Jose Castro, and instructed him to endeavor to settle the dispute, and in case of failure, to report what was just to be done. That Jose Castro being unable to effect the settlement, gave him a map with a line drawn on it, as that, he thought it just to be established. That the witness accepted this line, and ordered the grant to issue bounded on the east by the Deramadores de Aguas on the side of the high hills, on the west by the bay, on the south by the Arroya de San Lorenzo, and on the north by the Arroya de San Leandro. He also stated that the grant contained the usual conditions, and was for a league, more or less, and that there was a special condition that the Indians should not be molested. A paper was then shown to the witness, which he identified as the official note sent to the Secretary of the Governor when the latter asked for the first plan. He also identified and proved the report of Jose Castro (a document produced from the archives), and stated the marginal order to be in his (witness') handwriting.

R. A. Thompson, one of the late board of land commission-

ers, swore that he had examined some three hundred or four hundred *expedientes*. That they did not all contain copies or drafts of the grants. That they frequently varied from the grants delivered to the parties, but, in a majority of cases, not materially; but in some cases they differed on substantial points. That the proceedings, as shown in the *expediente*, were regarded by the board as affording proof of the existence of a grant. That he never saw any book where the titles were recorded. That one has been mentioned, but that it was not kept up except in the earlier times.

John Saunders, deposed that his professional firm had been employed to prosecute the claim under the Estudillo grant. That with a view to prosecute the same he had received a Spanish paper, signed by Juan B. Alvarado as governor, and Manuel Jimeno as secretary. It was a grant to Joaquin Estudillo, for the ranch of "San Leandro."

Governor Alvarado was recalled, and the original expediente of Estudillo from the archives, was handed to him, and asked if he could identify it, and then testify from his own recollection to the contents of the original grant delivered to the party.

To this the defendant's counsel objected, on the grounds,

1. Because the draft was not made by himself.

2. It was not compared by him with the original.

3. Because it is not a record, nor a copy of the original authorized by law to be taken.

4. Because not the best evidence in whose handwriting the grant is.

The objections were overruled.

Witness Alvarado, on looking at the expediente identified it and recollects it distinctly, and the expediente was admitted as evidence.

R. C. Hopkins was sworn. Stated he was a clerk in Surveyor's office; that a book of titles is to be found among the archives, for the years 1834, 1835, 1836. Since that time no such book has been kept or found. This witness identified the expediente as one of the archives.

In order to fortify the testimony in relation to the existence of the original grant, S. G. Tenant was sworn on behalf of plaintiff. He stated that he had seen the original grant in the possession of John B. Ward, about a month after the death of Estudillo, at San Leandro, at the house of the widow of Estudillo; it was signed by Governor Alvarado, whose handwriting was known to witness, and, as witness believes, by Manuel Jimeno. The grant was dated in 1842. Witness was acquainted with the Spanish language.

Jose Berreyesa, another witness, stated that he had seen the original grant to Estudillo in 1843 or 1844, and that the signatures of Alvarado and Jimeno were genuine; that the grant was for the "San Leandro Ranch," for one league square; and witness gave the boundaries of the ranch.

John B. Ward, a witness for plaintiff, was called to prove the loss of the original deed. He was objected to by defendant's counsel as incompetent, having married one of the daughters and heirs of Estudillo. He was admitted by the court to prove the loss. He stated he had received a grant signed by Alvarado and Jimeno officially, from the professional firm of Saunders & Hepburn, Attorneys at Law, on 2d September, 1853, at their office in San Francisco, at one o'clock, P. M. That Hepburn & Saunders had been employed professionally by the heirs of Estudillo, to prosecute their claim before the Land Commissioners; that having been advised by Messrs. Saunders & Hepburn to engage additionally the services of Judge Thornton, he took the grant to carry it to that gentle-

man's office; on his way there he heard of a squatter difficulty on the opposite side of the bay, in the vicinity of San Leandro, in which a man was killed; that witness hastened across the ferry; that the weather was bad, and witness undertook to pilot the boat; that she was detained all night on the water; that next morning the grant was gone; thinks it must have dropped from his person during the night; he had searched for it in vain, and has never been able to find it.

Cross-examined.—Witness had seen the document before he received it from Saunders & Hepburn; it was signed by Alvarado and Jimeno; it had been exhibited to witness by Signora Estudillo, as her title; it was the same document received by witness from Saunders & Hepburn.

The defendants moved the court to exclude all evidence, oral and documentary, which had been given to prove the existence, loss, or contents of the original grant, on the grounds,

1. Because the grant itself, if produced, would not prove that a legal title had passed to Joaquin Estudillo.

2. Because the grant had not been approved by the departmental assembly.

3. Because there was no official segregation of the land from lands of a like character.

4. Because the title is merely equitable.

5. Because the best evidence of the former existence of the grant has not been produced, the law showing that a record was required to be kept.

This motion was overruled; reserving it for the final decision of the court, after all the testimony should have been delivered.

We proceed now to dispose of it.

A further examination satisfies us that there was sufficient testimony offered to authorize the introduction of secondary

evidence to establish the existence, contents, and loss, of the original grant, and that the best evidence of which the nature of the case permitted, was given for that purpose. As to the objection that the title of the plaintiff is merely equitable because there had been no previous approbation of his grant by the Assembly, it is important in considering it to look to the relative situation of the parties.

Joaquin Estudillo, under whom plaintiff claims, went into possession of the land in controversy in 1837, which he retained until 1842, when he obtained his grant. From that time he continued to reside upon it until his death in 1852, since which time his widow and family have been in occupation of it. During this long possession he has had a large stock of cattle on the place, and cultivated it to the extent of some three hundred acres in different parts. Such is the title of the plaintiff.

The defendants have given no evidence of title whatever, unless the position they assume be correct. It is, that the land in controversy is part of the public domain, to which they have pre-emption rights. This position cannot be deemed as giving title. The act of 3d March, 1853, entitled "An Act to provide for the survey of public lands in California, the granting of pre-emption rights, and for other purposes," expressly exempts from pre-emption this very land, claimed as it is "under a foreign grant or title."—10 Statutes U. S., 246.

3. The land in dispute, if public land, as contended for by defendants, is so because it was acquired by the United States government by treaty from Mexico. Now, the act of congress of 3d March, 1807, entitled "An Act to prevent settlements being made of lands ceded to the United States, until authorized by law," expressly inhibits the entry upon, taking possession of, or settlement on any lands ceded or secured to

the United States, by any foreign nation, which lands have not been previously sold or leased by the United States, or the claim to which land has not been previously recognized and confirmed to the person entering, &c., by the United States.—2 Statutes U. S., 445.

In the case at bar, the defendants pretend to no title whatever from the United States, and we have seen by the act of congress of 3d March, 1853, in special reference to lands in California, the land in controversy, claimed as it is, under the grant of a foreign government, is exempted from pre-emption rights. The defendants are therefore to be viewed as mere occupants of the premises, without pretense of title. As such occupants, they rest the defense of their possession upon the invalidity of the title of the plaintiff. Under this view of the case the court will make every intendment which the law allows, in favor of the plaintiff's title. The ground on which it is assailed is, that the grant under which plaintiff claims, never having received the approval of the departmental assembly, conveyed only an inchoate title. Whether, in fact, such approval was obtained, is matter of evidence. Now, in this case, the grant in terms recites that it is given by virtue of the said grant, and the approbation the party had received from the most excellent departmental assembly. Now, if this recital in the grant be conclusive, there can be no doubt that the fee passed by the grant. If not conclusive, it is *prima facie* evidence, which must prevail in the absence of all other testimony. The cotemporaneous date of the concession and the grant is relied on by the defendants; but this cannot be held as disproving the positive statement in the grant. *Non constat* that the assembly was not in session at the time, or an approval of the contemplated grant had not been obtained at some previous session by the governor. The grant, under any

view taken of it, comes within the definition of a colorable title, as given by the Supreme Court of the United States, who say that "color of title is that which, in appearance is title, but which in reality is no title." (18 Howard, 56.) The grant professes and has on its face all the requisites of a complete legal title, and constitutes at all events colorable title; which, accompanied by possession, will maintain an action against mere trespassers.

In the course of the trial the defendants called the plaintiff, Clement Boyreau, who deposed that he did not know Robert Grimes Davis except in connection with this case. On the 14th November, 1855, at the request of a friend he accepted the transfer of the undivided half of 1-18 of the Rancho de San Leandro, for the consideration of $8,000. He accepted the transfer to oblige a friend; the deed was not delivered to him; it was deposited with his attorneys, Saunders & Hepburn; he had no interest in this purchase himself; a friend requested him to permit the title to be transferred to him, and his attorneys informed him they held the title for him; that it was in their office subject to his disposition; he had never done any act limiting or impairing his title; did not know whether the consideration had been paid by any one; he held the title for a Mr. Touchard; did not give orders personally for the institution of this suit.

The deed to the plaintiff had been previously given in evidence. The defendants now moved to exclude it on the grounds,

1. Because it was merely colorable, and executed solely to give jurisdiction to this court.

2. Because there was no sufficient proof of the delivery of the deed.

The objection was overruled, and, the court thinks, correctly.

It was contended that a deed merely colorable passed no title to the plaintiff. But we are of opinion that by this deed the legal title was vested in him, and that the ground of objection is, that he is not the real but merely nominal party to the controversy, the real party being a citizen of this State. Had this objection been taken by plea in abatement, it would have been sustained. But the defendants having omitted to interpose it, cannot now avail themselves of the defense. Such has been the ruling of the Supreme Court, where the citizenship of the parties to the record has been sought to be shown on a trial of the merits, and the same rule applies where a similar fact is attempted to be proved with regard to the real party to the controversy.

The expediente of one William Castro was next introduced by the plaintiff. It was proved to have come from, and to be a part of the Mexican archives in the surveyor-general's office, and contained a copy grant, and *desino* of a ranch directly bounding on the San Leandro ranch, and was offered to show the line recognized by the Mexican authorities at the time, as the line which on one side bounded the ranch of San Leandro.

It was objected to and the objection overruled, as the court thinks, correctly.

The plaintiff then introduced several witnesses to establish what are called the Rodeo boundaries of the San Leandro. This was objected to, and the objection overruled. The question as to these boundaries will be discussed hereafter. The genuineness of the grant was assailed by defendants, by the introduction of the testimony of one Marcus Esquilla; who deposed that in the spring of 1849, he had a conversation with the grantee, Estudillo, in which the latter showed witness the title-papers to the rancho, which were not signed, and the

reason assigned by Estudillo for their not having been signed was, that the government would not make a grant until he, Estudillo, had effected some settlement with the Indians; that the said papers formed what is called an expediente, and included the form of a grant, which was not signed; that said Estudillo, told witness these were all his title-papers. The conversation is alleged to have taken place in the spring of 1849. To discredit this testimony, a witness (Felipe Fierro) was sworn, who deposed that he was well acquainted with Esquilla, and corresponded with him about his business until his death, and subsequently with his brother; that in May, 1850, both Estudillo and Esquilla happening to be in the store of witness, the latter asked, "Who (meaning Estudillo) that gentleman was?" Witness did not introduce the parties. It is evident that if Esquilla did not know Estudillo in May, 1850, he could not have had the conversation with him he swears to, in the preceding year. But still, it is better to view the testimony of the discrediting witness as erroneous as to the time, and consider the fact of such conversation as established by the evidence of Esquilla. Still, the recollection of a witness as to spoken works of several years standing are to be received with caution, when the testimony which has been given of the original grant is considered. The witness may be prepared to swear that a party had said the papers exhibited were all the papers in his possession; still, there may have been misapprehension as to what was said, or in fact all the papers may not have been exhibited.

Again, the reason which the witness assigns as the one given by Estudillo for the non-signature of the grant, to wit, that he had omitted to settle with the Indians, is not in unison with the practice of making grants subject to the Indian rights. It is further contradicted by the fact in this case, that the grant

is made to exclude the possessions of the Indians. A previous settlement, therefore, in relation to them, was not indispensably necessary to the issue of the grant. To divest title on such testimony, where the counter evidence is as strong as it is in this case, would be to decide contrary to the weight of evidence.

Governor Alvarado swears he issued the grant. The expediente from the archives proclaims, and the long possession of the grantee under it tends to prove, its genuineness. Jose Berreyesa stated that he had seen the original grant in 1843, and proves the signatures of both Alvarado and Jimeno. John B. Ward swears that he had seen the grant, and also proves the signature of Alvarado; and lastly, John Saunders swears to have been in possession of the grant. In view of all the testimony, and acting as jurors, we find that the signatures to the grant have been established.

Having stated the rulings of the court and the objections of counsel thereto, during the trial, we proceed to consider the merits of the case, and the evidence which establishes the possession of plaintiff, and its extent.

It is ascertained that long previously to the intrusion of the defendants, the grantee and those who claimed under him had been in possession of the tract sued for; that from 1837 to 1842 the grantee had resided on the rancho known as the San Leandro; he had built a house upon it, resided thereon, and stocked it with cattle; his possession previously to the issue of the grant had not only been recognized, but actually authorized by the Mexican government; and in 1842, when he obtained his grant, the general limits of his land were notorious. It is proved by numerous witnesses that both before and after the grant, the tract he occupied, and was recognized as possessing, was the San Leandro Rancho, of which the notorious and

undisputed boundaries were the two arroyos of the San Leandro and San Lorenzo, the hills, and the bay, and to have been with his family as notoriously and completely in the occupancy of it as, according to the customs of the country, any Californian could be. He occupied it until his death, in 1852, and stocked it with cattle marked with his brand. No one, save a few Indians, lived on or occupied any portion of his land; and over the whole tract he asserted all those rights which at that time could have been asserted by the proprietor of land in California. He cultivated portions of it, in the neighborhood of his house, and near the San Leandro creek.

In 1842, the witness Valencia, took, by permission of Estudillo, her father-in-law, cattle to pasture on the rancho, which were kept on the tract between the two creeks; and, with the consent of Estudillo, her husband cultivated a portion of the land on the San Lorenzo creek. From the whole tract the cattle of Estudillo were gathered; and on the stock running within its limits he exercised all the rights of ownership. For the purpose of showing the nature and extent of his possession, the plaintiff introduced testimony to establish what are termed the "rodeo boundaries" of his ranch. The nature of these requires explanation. The extensive tracts of land belonging to the former inhabitants of this country were never separated from each other by inclosures. But a small portion of the large extent owned by the rancheros was put under cultivation; and their herds of horses and cattle, in which their principal wealth consisted, roamed at large over the extensive tracts conceded to them by the government. At a certain season of each year, however, the cattle were collected from the limits of the rancho, at a place, usually near its center, called the "rodeo" ground. Here the young cattle were branded with the mark of the

owner, and the whole herd were confined for a short period, to habituate them to the spot, and insure their return at the ensuing season. The proof of ownership furnished by the brand on the animals, seems to have been universally respected; and wherever the cattle might wander, they could be reclaimed by the owner. The young, unbranded cattle, which still followed the mother, were recognized as belonging to the owner of the latter; but there were many which had no mark, and having ceased to follow the mother, mingled indiscriminately with the herd. These were called *orijanas*, and by the custom of the country were deemed to belong to the owner of the ranch on which they were found. In driving, therefore, the cattle to the rodea, the vaqueros were required to observe scrupulously the boundaries of the ranch, for only the *orijanas* found within them were considered as belonging to the proprietor giving the rodeo. That these boundaries were generally respected, is proved by several witnesses. To drive cattle, on the occasion of a rodeo, from a neighbor's land being considered, as stated by one of them, "worse than squatting." The observance of the boundaries was not secured by the customs of the country alone; for the neighboring rancheros were always invited to be present when a rodeo was to be given, and attended on horseback to observe the limits from which the cattle were driven, and to reclaim any of their own that might have mingled with the herd. The rodeo boundaries of a ranch, or the limits from within which all the cattle upon it were collected together, thus became generally known; and when, as in the case at bar, they have been recognized and acted upon for a long series of years, they afford the best, if not the only evidence of the limits of an actual occupation, which the habits of the people permitted them to furnish. To exact of proprietors using their lands for

purposes so different from those to which we apply them, evidence of actual occupation by inclosures or cultivation of the soil, would be to demand what could never be afforded. There is surely no magic in a fence. In a country where land is owned in small parcels, and usually inclosed, such inclosure affords unmistakable evidence of appropriation and occupancy. When, therefore a right is claimed to have been acquired by an adverse possession without color of written title, the party is restricted to the land the exclusive right to which he has asserted notoriously by inclosing or cultivating it. The fence or cultivation, of themselves, confer no title. They only afford evidence of the intention to assert a right to the land included within them. The same evidence is afforded by an entry on and occupation of a part of a tract of land under color of a written title to the whole. For in that case, a party is deemed to be in possession up to the limits of his deed. But other acts equally significant of the parties' intention (being the strongest that circumstances admit), may have the same effect. Where, by the customs of a country, acts of ownership have been exercised, and the land within certain limits recognized as claimed by those acts. Where the party has used and possessed the land in the only way in which an owner would use and possess it, and as none but an owner would use it; where the limits of the land to which he thus asserts his rights are notorious, and have been recognized for a series of years, and undisputed,—it seems to us that such facts furnish evidence of a possession as satisfactory as if, according to the customs of an old and settled country, a fence had been built about it; and sufficient to enable a party to maintain his right to it in a court of justice, against intruders who have entered not only without pretense of title, but in open violation of law. In this case, the rodeo boundaries are clearly

shown to have been established and recognized by the neighbors of Estudillo, from a period long anterior to the acquisition by the United States of this country. By the ascertainment of these boundaries, the plaintiff has established the actual extent of his actual possession. To fortify the evidence of possession, testimony was adduced to prove that in 1853, shortly after the death of Estudillo, his representatives, who continued to reside on the land, rented a portion of it, about three hundred acres, to one Joseph Demont, who entered into possession. This land was inclosed by a fence, and includes the land upon which one of the defendants, and a portion of the land upon which another, have "settled."

In the same year, and after the encroachments of American settlers had taught them the virtue of a fence, the representatives of Estudillo employed one J. C. Pelton, who, under their direction fenced in several thousand acres, and erected on the land some six or seven houses. The fences and houses have been burnt by accidental fire; and a portion of the land is now occupied by some of the defendants to this action. Recapitulating, then, the evidence as to possession, we find that Estudillo, the grantee, went into possession in 1837. In 1839 he obtained a provisional license to continue in possession, from the governor. That in 1842 he obtained a grant, from the date of which he has occupied and claimed the ranch of San Leandro, with well-known boundaries. That he built a house upon, and cultivated portions of the land. That he had his fields, corrals, and rodeos. That his cattle roamed over it, bearing his brand, and were herded upon it by his vaqueros. That at stated periods, according to the recognized customs of the country, his cattle were driven together from the external limits of the ranch; and that in every way in which a Californian could use land, he exercised acts of ownership over it.

That the ranch was recognized as being in his possession; and so notorious was the fact, that an old resident of the country swears, "that it was so fixed in his mind that he was the owner that he took it for granted."

After the death of Estudillo, we find his representatives residing upon and claiming the whole of it; and, though intrusions soon commenced, in the hope of retaining it renting a portion of it, and surrounding with fences several thousand acres, portions of which are now "settled" upon as "vacant public lands."

If the foregoing facts do not constitute possession, then no occupancy can be established by a California ranchero; for nothing short of actual inclosure or cultivation would suffice. We consider the evidence sufficient to establish a prior and peaceable possession, and its extent, so as to authorize the plaintiff to maintain this action. The rodeo boundaries have been established so clearly by the testimony, that the plaintiff might have recovered to the extent of them. But he has himself introduced a written title, and to that we must look. The grant calls for the boundaries of the ranch,—the arroyos of San Leandro and San Lorenzo on the north and south; on the west, the bay; and on the east, the *derramadores*, or springs of water, and from thence a line, southerly, drawn to the San Lorenzo so as to exclude the possessions of the Indians. These limits on the east are considerably within the line of the crest of hills which, according to the testimony, forms the eastern rodeo boundary. But the plaintiff producing this grant, must be restricted to the boundaries thereon designated. At the time of the grant, one or two Indian families inhabited an adobe house on the land at the base of the eastern hills, and had some cultivation near the house, and at a bend of the San Lorenzo, at a point called "Paso Viejo." It is not

easy to ascertain what at that time was the precise extent of the Indian possessions. It is practicable, however, to adopt a line which will exclude the land which, under any reasonable view of the evidence, they could have occupied. With the exception of the uncertainty which attends the precise location of this eastern line, the boundaries of the ranch have been ascertained by proof of what we consider as complete possession as could be furnished by any California ranchero. The quantity of land granted to Estudillo was one league, a little more or less. It appears from the testimony, that the actual quantity exceeds that amount but a fraction; and may be deemed to be covered by the words "more or less," inserted in the grant. The complete possession of all the land to the extent of three of the boundaries, and beyond the fourth, is established by proofs. It remains to inquire, after restricting the last-mentioned line to that called for in the grant, which of the defendants are intruders upon it. A stipulation by the parties has been filed, in which it is agreed that the defendants respectively occupy the several tracts designated by their names on a map marked A, to which reference is made. On inspecting this map, we find some of the defendants in the occupancy of land which at the time of the grant was probably in the possession of the Indians. We shall therefore direct a verdict of "Not Guilty" against them. Against those who are clearly in possession of land not excluded by the grant by reason of the Indian possessions, a verdict of "Guilty" must be rendered. We have fixed the line according to the limits as ascertained by the testimony in this case, leaving its precise location to be established hereafter as between the government and the parties interested in its precise location.

The attorneys of the plaintiff will draw the form of a verdict for signature in favor of William Campbell and William Carhart, and against all the other defendants, who, by the

stipulation entered into, it is agreed are in possession of the premises.

After the opinion of the court had been read, the counsel for the defendants moved the court to reconsider so much thereof as related to the eastern boundary line of the ranch, whereupon the court, after argument of counsel, took the same under advisement, and afterwards delivered the following, affirming the former opinion of the court:

In this case we have been asked by defendant's counsel to reconsider our views in relation to the location of the eastern line of the San Leandro ranch. The line, as fixed by us, excludes two of the defendants and includes the others; and it is urged that a re-examination by the court may result in so giving the line as to exclude from the operation of the verdict an additional number of the defendants. We have carefully examined this question, and now give the result. We are free to confess that the precise location of the eastern line is not easy of accurate ascertainment. This arises from the difficulty of establishing with precision the exact extent of the Indian possessions at the time of the issue of the grant. The testimony on this point is conflicting; but after a careful review of it our conclusion is, that the possessions of the Indians were confined to the adobe house which they occupied, and its immediate vicinity, and to some cultivated spots of land near the bend of the San Lorenzo Creek, at a point known as the "Paso Viejo." Numerous witnesses confine them to those points. One or two of the witnesses testify to a small cultivation almost due west from the springs, and about half a mile therefrom. But this is opposed by many witnesses, and is repudiated by the fact that to run the line so as to take in this isolated spot would be to so distort the line, as

we consider it designated on the map, as almost to destroy its identity. The defendants' counsel, in his brief, relies on a line deposed to by one of the witnesses, Ignacius Peralta. That this line was not intended to separate the Indian possessions from the land of Estudillo is evident, because the witness tells us that he knew the ranch of Estudillo in 1840, 1841, 1842, and 1843, and that he knew no line dividing the land of Estudillo from that of the Indians, although the witness had lived for twelve years within two hundred varas of Estudillo. The line which the witness deposes to is evidently a line known in the case as the "longitude line," which, with the "latitude line," were run by the functionary Fernandez for the information of Governor Alvarado. This line of longitude, denominated in the counsel's brief, the "Peralta line," is urged as the line delineated in the *desino* of Estudillo's *expediente*, and described in the grant. This line is designated in the grant, using the words into which the original has been rendered by the counsel, "a line on the east by the spillings of the springs that are near the house occupied by the Indians, and on the south by a line drawn from thence to the San Lorenzo so as to exclude the land occupied by the Indians which are located there." Assuming this translation to be correct, there are objections which oppose themselves to the location of this specific line.

1. To adopt it would be taking a part of two lines designated on the *desino* to form the boundary, viz.: the line of latitude to the springs, and thence leaving that line, to adopt the line of longitude from that point to the mouth of the San Lorenzo creek.

2. Such line must at the springs diverge to the west, and run to the *mouth* of said creek, instead of running to the creek as called for; this would be to repudiate the creek as a bound-

ary, whereas the *desino* has written on it all along that creek these words, "Arroyo de San Lorenzo lindero con San Jose;" thus distinctly declaring the line of that creek to be the boundary between the ranch and San Jose.

3. This line would exclude a considerable portion of land intermediate the springs and the creek, which, confessedly, has never been in the possession of the Indians.

4. It is not probable that the grant would call for the creek parallel as it runs to the opposite creek of San Leandro, as the *terminus* of the line called for, instead of its mouth, if the latter was intended.

These are some of the difficulties which suggest that this longitude line is not the one designated on the map. There are other considerations, growing out of the grant itself. To arrive at a correct translation of it, we have invoked the aid of competent, skillful, and disinterested persons. The defendants have rendered the words "por la parte del Sud," in the grant as meaning "on the south," equivalent for the southern boundary. Now, we understand these words in the connection in which they are used, to be translated differently; and, further, we consider that by the terms of the grant, the line to be run from the springs of water is to be a straight line. The grant, including the words "por la parte del Sud," calls for the boundary on the east,—the drawings (*derramadores*) of the springs in the lands occupied by the Indians settled there, from this point in a straight line towards the south, to the Arroyo de San Lorenzo, without including the land cultivated by the Indians. By this description the line is delineated as a "straight line" from the starting point to the creek, deflecting only so far as to exclude the Indian possessions. Calling for a "straight line," it would seem that a direct one was intended, departing only from a direct line to the extent of excluding the Indian posses-

sions. Now, the line of longitude would, if adopted, traverse the greatest distance which at any point intervenes between the starting point and the creek, viz., its mouth.

Again, the line called for by the grant is to go south; and the longitude line, if adopted, would run west from the *derramadores* to the mouth of the creek. We have seen that the map itself calls for the San Lorenzo as the boundary in terms, and by having in writing on its face along the creek, the words we have quoted. Again, in the report of Jose Castro to the governor, it is stated that the Mexican functionary Fernandez, had delineated two lines on the *desino*, one of longitude and the other of latitude, leaving the selection to his Excellency. By his marginal decree, the governor selects the line north and south as the line of W. Castro's land. This line, it is true, was selected some time prior to the grant to Estudillo; but it serves to show the understanding of the government as to the dividing line between the land granted and the adjoining land. This line is not only delineated on the map which accompanies the *expediente* of William Castro, but is found also on that of the *expediente* of Estudillo when he obtained the grant for the adjoining land. Governor Alvarado, who issued the grant, swears to the San Lorenzo as the southern boundary. Numerous witnesses depose to the same fact. Ignatius Peralta, one of the defendants' witnesses, states that for a long period he lived in the immediate vicinity of Estudillo, and that during that time the pasturage of Estudillo's cattle extended over the plain up to the San Lorenzo on the one side, and the San Leandro on the other. Durante Valencia, a witness, states that in 1842, with the permission of Estudillo, she cultivated lands on the bank of the San Lorenzo; and another witness, A. C. Smith, deposes that in 1851 Estudillo had forty acres in barley on the same creek. The occupancy of Estudillo up to

the San Lorenzo, and its notoriety as the southern boundary, have been established by testimony. These facts connected with what we consider the correct interpretation of the grant, confirms us in the conclusion that the line approximating to what is termed the *adobe* line; is the true line; and the most careful examination of the testimony and the language of the grant, have brought us to the conclusion that protection has been afforded to the former Indian possessions by fixing the line designated in the grant as the eastern boundary, by which all the defendants, save Campbell and Carhart, have been brought within the limits of the San Leandro ranch.

Saunders & Hepburn, for plaintiff.

A. M. Crane and *Thompson Campbell*, for defendants.

Affirmed, 21 Howard, 223, on a collateral point. No decision given on the rulings of the court below, on the law and facts of the case.

FRIEDMAN *v.* GOODWIN *et al.*

U. S. Circuit Court, July Term, 1856.

The title to the premises in dispute was in the United States, until the admission of California into the Union.

Intermediate the treaty of Guadaloupe Hidalgo and the admission of California into the Union, no military officer of the United States could make any alienation of the public land.

On the admission of California into the Union, she became the proprietor of the land in dispute.

The sovereign may, although an individual can not, render valid a void act.

The *name* of a grantee is not essential to the validity of a deed. A grant may be made to classes of persons, if sufficiently designated by a *descriptio personarum*.

The act of the legislature of this State, approved May 18, 1853, was a legislative grant.

Where a grant made by government refers in general terms to a certainty, it is the same as if the certainty had been expressed in the grant, though it be not matter of record, but lie in averment by matter *in pais*.

This cause came on to be heard on complaint and general answer, upon an agreed statement of facts in the nature of a special verdict, by consent of parties. It is in *hæc verba :*

1st. That the premises sued for are situated upon the navigable tide-waters of the Bay of San Francisco, in the State of California, which bay is an arm of the sea, in which the tide regularly ebbs and flows; that the said premises are within the limits of the water-line front of the city of San Francisco,

as defined in and by a certain act of the legislature of the State of California, entitled "An act to provide for the disposition of certain property of the State of California," passed March 26, 1851, and were below usual high-water mark at the time California was admitted into the Union, and so continued below high-water mark, and covered by water, at the date of the passage of the said act of the California legislature.

2d. That by virtue of a sale, made in accordance with an act of the legislature of the State of California, passed May 18, 1853, entitled, "An act to provide for the sale of the interest of the State of California in the property within the water-line front of the city of San Francisco," as defined in and by the act entitled, "An act to provide for the disposition of certain property of the State of California," passed March 26, 1851, and certain *mesne* conveyances, the plaintiff became seized of all the right, title, and interest in the premises, on the 18th February, 1854, which the State of California had on the 20th October, 1853, the date of the commissioners' sale, in and to the premises sued for, and still continues so seized. The said acts of March 26, 1851, and March 18, 1853, are contained in the published statutes of California, and are hereby made a part of this special verdict, with the same effect as if said acts were herein set forth. That the defendants have been in the adverse possession of the premises since the —— day of December, 1855, and now hold the same.

On the 27th day of September, 1849, a lease by deed was made by Captain E. D. Keyes, of the 3d Regiment of Artillery of the U. S. Army, and then commanding officer of the post at San Francisco, Upper California, to Theodore Shillaber, of certain lands then and ever since known as the "Government Reserve," of which the premises sued for in this action are a part. The lease is then set out in *totidem verbis*. (It is only

necessary to understand that the lease was made by the officer above named to the said Theodore Shillaber, for the term of ten years.) On the —— day of December, 1849, the said lease was by a writing thereon, approved and ratified by Brevet Brigadier General Bennett Riley, Governor of California; and afterwards, Alexander H. H. Stuart, Secretary of the Interior, under the seal of his department, made the following indorsement, to wit, "I hereby ratify and confirm the within lease, on the part of the United States." The said Shillaber afterwards, by deed bearing date on the 11th day of April, 1851, assigned the said lease, and conveyed all his right under the same to the leased premises, to Joseph C. Palmer, Charles W. Cook, George W. Wright, and Edward Jones, who constitute the firm of Palmer, Cook & Co. On the 26th day of March, 1851, the legislature of California passed an act, entitled, "An act to provide for the disposition of certain property of the State of California;" which said act is hereby incorporated in this special verdict, with the same effect as if fully set forth. The lands sued for in this action are above the value of two thousand dollars, and are part of the lands mentioned in the second section of said act as "the property known as the Government Reservation;" and, by a series of intermediate conveyances, the defendants are invested with and seized of all the title which Palmer, Cook & Co. derived from the said lease to Shillaber and the assignment thereof to them, and the said act of the legislature of California, passed March 26, 1851, for an unexpired term, beginning on the —— day of December, ——, and ending on the —— day of December, 1847.

It is hereby stipulated that the foregoing statement shall be taken and accepted as the special verdict of a jury in this action, and shall be entered on the record as such. And the

court shall determine the law arising thereupon, and enter judgment for plaintiff or defendants, as it may determine the law.

CRITTENDEN & INGE,
Attorneys for Plaintiff.

LOCKWOOD & WALLACE,
Attorneys for Defendants.

MCALLISTER, J.—The plaintiff sues in ejectment for certain premises described in his complaint, and rests his title upon the rights acquired under a sale made of the premises sued for, under and by virtue of an act of the legislature of the State of California, passed on the 18th day of May, 1853, entitled "An Act to provide for the sale of the interest of the State of California in the property within the water-line front of the city of San Francisco, as defined in and by the act entitled 'An Act to provide for the disposition of certain property of the State of California,' passed March 26, 1851." (Comp. Laws Cal. 767.) The defendants rely for the defense of their title, on an act of the same legislature, passed previously, on the 26th March, 1851. (*Ibid.* 764.)

The superiority of title depends upon the solution of two questions:

1. In whom was the title to the disputed premises on the 26th day of March, 1851, at which time the elder title of the defendants accrued?

2. What was the legal effect of that upon their title?

On the ratification of the treaty of Guadalupe Hidalgo, the title to the premises passed from Mexico to the government of the United States. In the latter it remained during the territorial existence of California. The lease executed by Captain Keyes during that existence, approved by General Riley, and subsequently ratified by A. H. H. Stuart, Secretary

of the Interior, could divest no title from the United States, and consequently could transfer none to Theodore Shillaber, under whom defendants claim. The lease, for all purposes of conveying any title, was still-born at its birth. The title remained in the United States; and on the admission of California into the confederacy on an equal footing with the original States, the title passed, under the operation of that admission and of the Constitution of the United States, to the State of California, where it remained until the 26th day of March, 1851, at which date the act under which the defendants claim was passed.

What is the legal effect of that act? It is well to remark, *in limine*, that all objections urged against the title of defendants on account of non-payment of rent, or by reason of the failure of the lessees to comply with any other condition of the lease from Captain Keyes, are disposed of by the fact that they are not claiming title under it. They claim title from the State under the legislative grant of March 26, 1851. To that, then, we are to look for the source of it. If the State of California, as the court believes, had the title to the premises in dispute vested in her, and if she transferred it to the defendants, or to those under whom defendants claim, then the purchase under the sale by virtue of the subsequent act of the legislature of this State on the 18th day of May, 1853, gives their title no standing against that of the defendants. The act of the legislature to be considered, is entitled "An Act to provide for the disposition of certain property of the State of California," passed March 26, 1851. (Comp. Laws Cal. 764.) The first section describes the boundaries of the lots in relation to which it is intended to legislate. The second section grants the use and occupancy of all the land described in the first section, to the city of San Francisco for the term of ninety-

nine years; save as therein afterwards excepted, being those lands which have been sold by the authority of the *ayuntamiento*, or town or city council, or by any alcalde of the said town or city, at public auction, in accordance with the terms of the grant known as Kearney's grant to the city of San Francisco; or which have been sold or granted by any alcalde of the said city of San Francisco, and confirmed by the *ayuntamiento*, or town or city council, thereof, &c. There are certain terms annexed to the grant, to which it is unnecessary to refer. This second section closes with the following words: "The property known as the 'government reserve' is exempt from the operation of this act; *except that any estate held by virtue of any lease or leases, executed or confirmed by any officer of the United States on behalf of the same, shall be and the same are hereby granted and confirmed to the lessees thereof; and the written instrument whereby such lease or leases was made shall, in all actions brought by the lessees for the recovery of the lands so demised, be sufficient evidence of title and possession to enable the plaintiff to recover.*" It is upon this last clause that defendants rely. The construction contended for by plaintiff is, that the confirmation by the act is limited to "any estate held;" and that no estate was held under the lease, it being void; that nothing in fact was confirmed, and therefore the lessee took nothing by the legislative grant. It is true, that an estate in land means, in strict legal parlance, such *interest* as the tenant hath therein; but the word "estate," when used in a statute, or instrument other than a deed, and calling for such meaning, is to be deemed as passing the land itself. The statute, speaking of the estate (referring to the lands described), declared that they are hereby *granted;* evidently referring to those lands. But, turning from this logomachy, or war of words, there are other and less verbal

arguments which suggest the unsoundness of the construction urged by the plaintiff's counsel. It would impute gross ignorance to the legislature, not to award to them the knowledge of the utter impotency of any attempt by an officer of the government to alien any portion of the land the property of the United States, without the authority of an act of congress. That the president with the heads of departments combined could not so have done, must have been known to them; and it is reasonable to consider that the legislature had a full knowledge that no interest by any unauthorized act of the officer could have been conveyed, and that large and extensive improvements had been made in good faith by individuals, and therefore they determined, in the distribution of the property, to save the rights of the occupants by a confirmation without which they would have had no legal existence. It is to be observed that the act does not stop at the point where the estate is confirmed, but proceeds to declare that the "written instrument" by which such "lease or leases were made shall, in all actions brought by the lessees for the recovery of *the lands* so demised, be sufficient evidence of title and possession to enable the plaintiff to recover." Now, although a private individual may not, the sovereign may confirm that which was originally void; and in this case the legislature has given vitality to the written instrument, so far as to constitute it, by their creative faculty, sufficient evidence of both title and possession, with the avowed purpose that he may recover the *lands*. This would seem to show clearly their intention to do what was attempted to be done, and to grant the lands at least for the terms mentioned in the leases. If this written instrument is made by the legislature a muniment of title sufficient to enable the party to recover the land, such legislative action is equivalent to a grant. The grantees who

were to take, were those who held by virtue of any lease or leases executed or confirmed by any officer of the United States on behalf of the same. The defendants bring themselves strictly within this class, and answer to the *descriptio personarum*. They hold by virtue of a lease executed in behalf of the United States, executed by one of the officers thereof, ratified by another, and confirmed by a third.

It is true that no grantee is named in this law; and it is equally true that a grant is void for uncertainty, where the grantee is not sufficiently designated to distinguish him from all others; and when such designation cannot be gathered from the grant, it cannot be supplied by parol testimony. Thus, a grant to the heirs of A, in being, is void; for *non-constat* who are the heirs of a living person. If the word "heirs" is to be construed "children," then, what children? Are those *in esse* at the time of the grant only to take; or were after-born to be included? Was the grant to take effect immediately, or after the death of grantor? If no children survived A, would his brothers and sisters take? There are no means of ascertaining from the face of the grant the intention of the grantor. In such case, therefore, the grant is void for uncertainty in the designation of the grantee.

Admitting this rule in its fullest extent, it by no means results that a grantee must be named. "The names of persons at this day are only sounds for distinction's sake, though it is probable they originally imported something more; as some natural qualities, features, or relations; but now there is no other use of them but to mark out the individuals we speak of, and to distinguish them from all others; and therefore in grants, which are to receive the most benign interpretation, and most against the grantor, if there be sufficient shown to ascertain the grantor and grantee, and to distinguish them from all others, the grant

will be good." (Bacon's Abr., Tit. Grant. C.) If they (the grantees) are so designated as to distinguish them from all others, the grant would be good without a name at all; and the mistake of a name in such a case would not vitiate. (*Hall* v. *Leonard*, 1 Pickering, 27.)

Again, parol evidence, though inadmissible to vary or contradict the terms of a deed, is competent to show the situation of a party in relation to things and parties around him; thus, if the language of a written instrument is applicable to several persons, parol evidence is admissible of any intrinsic circumstance to show what person or persons were intended. (1 Greenleaf on Ev. § 288.) In the interpretation of a grant, another rule prevails. Where a grant made by government in general terms *refers to a certainty*, it is the same as if such certainty had been expressed in the grant, though it be not matter of record, but lie in averment, by matter in *pais* or in fact.

There is no doubt that the grant in this case comes within the principles of the foregoing authorities. In the grant there is a *descriptio personarum* who are to take. The defendants have brought themselves within that description, and are entitled to a verdict. Upon consideration whereof, after hearing counsel for the respective parties, we adjudge that defendants are not guilty.

Crittenden & Inge, for plaintiff.
C. H. S. Williams, for defendants.

TOBIN *v.* WALKINSHAW, *et al.*

Circuit Court, U. S., July Term, 1856.

A MEXICAN grant which had never received the approbation of the departmental assembly, and had never been segregated from the public domain before the Treaty of Guadalupe Hidalgo, is not a title on which to maintain ejectment against any save a trespasser.

The rule at common law is, that in the construction of a deed, quantity must yield to specific metes and boundaries.

Such rule cannot be applied, in all cases, to Mexican grants.

The grant in this case is subject to be located at different places, as one or other of the three lines given may be selected as the base line. Such fact precludes any action by the court in this case.

Segregation of private from public land is a political act, and belongs to another department of the government.

This is an action of ejectment, brought for the recovery of lands situated in the county of Santa Clara, in this State. A jury trial was waived by the parties, and the case submitted on the law and facts to the court; each party reserving to itself the right of exception to the rulings of the court on the admissibility of the evidence, and to its decisions of the law upon the merits. The evidence offered, and the rulings thereon, with a statement of the facts proved, are given in the opinion of the court, delivered by—

MCALLISTER, J.—This action is brought for the recovery of certain lands situate in the county of Santa Clara, in this State. The cause came on to be heard at the present term of this court, a jury trial waived, and the case submitted on the law and facts to the court; each party reserving the right of excepting to the

rulings of the court, in relation to the admission of testimony, and to their decision of the law upon the merits.

The plaintiffs introduced and relied upon the *expediente* of Jose Reyes Berreyesa, and grant, dated 20th August, 1842, issued to him by Governor Alvarado, for the premises in controversy, under which grant plaintiff claimed title.

The grant was in the ordinary form of Mexican grants, and had annexed to it their usual conditions.

To the introduction of this testimony the defendants objected on the following grounds:

1st. Because it is no evidence of title on which an action of ejectment can be maintained.

2d. It is no evidence of possession, or its extent, if entry under it is proved.

The objections were overruled, and point reserved.

The defendants subsequently gave in evidence an alleged grant from the supreme government of Mexico, of later date than that of Berreyesa's, and an *expediente* under which they claimed from the Mexican government, a property in a quicksilver mine, alleged to be on the land sued for, and the delivery of which mine to the assignor, under whom the defendants claim, is alleged to have been given in the year 1845.

To all this documentary evidence the plaintiffs objected.

The objections were overruled, and the point reserved.

The sheriff's deed to Walkinshaw, one of the defendants, for the interest of one of the heirs of the grantee, Jose R. Berreyesa, was also given in evidence.

This was all the documentary testimony which went directly to prove title.

The first question, and which lies at the foundation of this action, arises out of the objections made by defendants to the title of plaintiff. It therefore first demands attention.

It is conceded that the grant under which the plaintiff claims, has never received the approval of the departmental assembly, and it is contended by defendants that the title of plaintiff held under it, is therefore inchoate.

To ascertain the character of this title, we must look to the Mexican legislation, from which it derived its existence.

The supreme executive of Mexico, in accordance with the provisions of the sixteenth section of the colonization decree of the 18th of August, 1824, prescribed certain regulations, under date of 21st November, 1828, having for their object the colonization of the lands in the territories of the republic.

The first article of these regulations confers on the political chiefs of territories, the power to grant lands, with the restriction that the grants should be issued in accordance with the general law, and under the qualifications therein expressed.

The first three of these qualifications are directory, and relate to the class of persons who are to become grantees, and the character of the lands to be granted.

The fourth confers on the political chiefs a power to grant or accede to the petition of the applicant, which is the foundation of the grant subsequently obtained.

The fifth, sixth, and seventh articles prescribe the mode in which grants are to be made definitively valid; and the eighth provides that after they have been made so, a patent, signed by the political chiefs, shall be issued, which shall serve as a title to the party interested, expressing therein that it had been made in strict accordance with the provisions of the law, by which "they shall proceed to give the possession."

From the foregoing it results:

First.—That although power is given by the fourth article to the political chiefs, to accede or not to the petition, the power to issue a patent or grant is withheld, or rather it is not con-

ferred upon them until *after* the concession was made definitively valid, by having received the approbation of the departmental assembly.

Second.—That no evidence of title was to be delivered to the interested party until after the issuing of such a patent.

Third.—That it was not contemplated that the party should go into legal possession until such patent shall have been delivered to him; the eighth article declaring it was by virtue of it, and the laws therein expressed to have been observed, that they should proceed to give the possession.

The fifth and sixth articles declare that, in order to render grants definitively valid, they shall receive the previous approbation of the departmental assembly, to which they shall be referred; and in case the political chiefs fail to obtain such approval, they shall report to the supreme government for its decision.

Such was the course prescribed by Mexico for the granting of lands in her territories.

It is evident that the departmental assembly was intended to be made the depositary of the granting powers to such an extent, that the political chief could alien no portion of the public domain without their previous approbation.

To them his action of acceding to a petition for a grant was to be referred, and he was to obtain their approval before he could thus alien, and before the evidence of title could be properly delivered to petitioner.

It seems clear that the supreme government of Mexico never entrusted to one man the uncontrolled power of disposing of the public domain.

He was permitted to inquire into the circumstances attending the petition, and accede to its prayer, and thus place the petitioner in a position to obtain a grant; but it was not until

after the approval of another department of the government that he was permitted to issue a grant; nor was it, as we have seen, contemplated that a party should go into judicial possession until such approval had been obtained.

A policy thus cautious has always characterized the Spanish American governments. In Upper Louisiana, while in a provincial state, although the lieutenant-governor had the right to make concessions, order surveys, and even place grantees in possession, the supervisory action of the intendant-general of Upper Louisiana and Lower Florida was necessary; and until his formal confirmation of the grant previously given, had been obtained, the party interested was deemed to have only an equitable title.

In Coahuila, although the governor had more ample powers of concession than those conferred upon the political chiefs of California, the confirmation of his acts by the intendant-general was deemed necessary to complete the title of the party.

In her legislation relative to the colonization of lands in California, Mexico did not depart from the cautious policy which distinguishes the Spaniard and his descendants. She did not confide to one man the exclusive power of granting, but interposed between him and the exercise of absolute power, the necessity of an approval by the departmental assembly, and in case they did not co-operate with him, an appeal to the home government.

The approval of the assembly was made precedent to the issue of the grant.

The practice which prevailed in earlier times in California was in conformity to the law.

The decree or concession was made, submitted to the assembly for approval, and then the patent or formal title was issued. Subsequently, it became the ordinary usage for the

governor to issue the concession and grant simultaneously, or the latter shortly afterwards, inserting in it a provision that it was subject to the approbation of the *junta*, as in this case. Such approval was frequently obtained subsequently, and a *testimonio*, or certificate of the fact, delivered to the party; in many cases, no approval of the *junta* was obtained.

The grantees, however, if they were not in the occupancy of the land, as not unfrequently was the case, would enter into the possession of all the lands described in the grants thus issued, and retain it, although, in many cases, their grants had not received the approbation of the assembly.

The Mexican authorities, however, recognized the importance of the approval of the *junta*, for the governor inserted in the grants a provision expressly subjecting them to the approbation of that body; and, so far as the numerous records of land cases which have come under our supervision show, we are led to the conclusion that the subordinate Mexican functionaries generally acknowledged the necessity of the approval of the junta to constitute title. We find a practical illustration of this in the case of *The United States* v. *Manuel Vaca and Felipe Pena.* This case is No. 54 on the calendar of the Land Commissioners, and No. 74 on the docket of the District Court.

In May, 1844, Vaca presented his petition to the governor, setting forth, among other things, that he had obtained a grant in the preceding year for a tract of land; that he had solicited the justice of the peace, for his jurisdiction, to give him juridical possession of the place, which had been refused because petitioner had not obtained the approval of the assembly to his grant; and concluded by affirming that the magistrate had overlooked, in some cases, the condition which required the approbation of the *junta*, and prayed an order

from his Excellency, directing the said justice to place petitioner in juridical possession without compelling him to wait for the approval of the assembly.

On this petition is the marginal order of the governor, which, as to that portion of the prayer which referred to the juridical possession, states: "With regard to the judicial possession which is claimed in this writing, the government is not authorized to order it to be given without the previous approbation thereof by the most excellent departmental assembly."

It is true, as alleged by the plaintiff, and before stated, that many parties went into possession of lands under grants made expressly subject to the approbation of the *junta*, and which had not received their approval; and it may be also true that this frequent practice may have induced a belief among many that such approval constituted no part of the title. But no usage or practice of the kind could convert the title, if originally inchoate, into a perfect one. The issuing of the grant by the governor, before obtaining the approval of the *junta*, with other circumstances, might give the party an equity which would bind the government; but it could do no more.

In *Menard's Heirs* v. *Massey* (8 Howard, 293), the party claimed under a grant from the lieutenant-governor of Upper Louisiana. The concession *granted* the land, dispensed with an immediate survey, but required that when any one settled on the place a survey should be executed, after which the party was to solicit from the intendant-general his title in due form. It was admitted that the lieutenant-governor had a right to deal with the public domain, make concessions, direct lands to be surveyed, and to put grantees into possession. "This, however," say the Supreme Court, "does not settle the question."

A usage also prevailed in Upper Louisiana to which the court refer: "It is remarkable (say they), that if we may trust

the best information we have on the subject, neither the governor nor the intendant-general has ever refused to perfect an incomplete title granted by a deputy-governor or sub-delegate."

Referring also to the position of Upper Louisiana at the time, the difficulties of intercommunication between its several parts and New Orleans, and the general condition of the country, as the reasons which rendered the completion of the title in due form almost impracticable, they conclude by saying, "there are but two instances known to exist, where the intendant-general was applied to for a complete title."

But all this "did not settle the question." "It does not depend (say the court) upon the existence of power, or want of power in the lieutenant-governor, but on the force and effect of the right his concession conferred."

We have not overlooked the fact that there is some difference between the imperfect titles issued by the governor of California, and those by the sub-delegates of Louisiana.

In the latter cases the grantees were expressly referred to the intendant-general to solicit the title in due form. In California, no more formal title was contemplated than that issued by the governor. But that title was not to issue until the concession had been approved. When therefore, it was delivered without such previous approbation, and made expressly subject to it, the situation of the grantee was analogous to the holder of a concession from the lieutenant-governor of Louisiana, in this, that both required the approval and confirmation of other officers or functionaries of the government to render their titles finally valid.

If, then, the usage which prevailed in Louisiana, more uniform than that which had been relied on in California, could not change the character of title as originally ascertained by

the nature of the right conferred by the concession, so in this case the title of the plaintiff must be fixed by the force and effect of the grant, and the laws of Mexico which gave it birth.

This we have done by an analysis of the regulations of 1828, which has conducted us to the conclusion that the title of the plaintiff is merely inchoate. Previous to the citation of authorities to fortify the construction we have placed upon this title, it may be well to notice some suggestions which have been made upon this point.

It is urged that by the governor's grant, the title to the land passed, liable only to be defeated by the refusal of the departmental assembly to approve it. This would be treating the refusal as a condition subsequent, which, on its happening, would defeat a previously vested estate. But the eighth article distinctly shows that it was not intended that a defeasible estate should vest by the governor's concession alone, else, why withhold from the party all evidence of title until after the approval had been obtained. The document issued after such approval was the only evidence of title the law gave him, and without which he could not obtain judicial possession.

The argument which attributes the suggested effect to the governor's concession supposed the party to have acquired an estate, without receiving any evidence of title, and when by law he could receive no such evidence nor be placed in legal possession until after the concession had received the approval of the *junta*. Such construction would defeat the whole policy of the law. If the party acquired by the governor's grant a legal title to the land, which was valid until defeated by the refusal of the *junta* to approve, the happening of such event could always be prevented by the governor's withholding the *expediente* from the departmental assembly. If they were never asked to approve, they could have no opportunity to refuse.

It was only the governor's grant definitively valid that gave to the party interested a right to receive a *documento*, or title, and to be placed in legal possession of the land. The refusal of the departmental assembly to approve it, was not a final bar to the proceedings; the governor was in such event bound to send it to the supreme government for its decision; but it was not until its approval was obtained, and the proceedings consummated by delivery of the documents, that the title passed, to any portion of the land, from the Mexican nation.

Another suggestion has been made. It is, that inasmuch as the governor could not legally deliver the grant to the party interested until he had obtained the approval of the departmental assembly, such approval may be presumed from the delivery of the grant.

The *expediente* in this case discloses no action whatever on the part of the *junta*, in relation to this grant. Besides, such presumption would have to be made in the face of the fact, disclosed by the archives for years, that the governors always issued the grant before the approval of the *junta*, as evidenced by the *testimonios*, or certificates, as to the fact of the approval having been subsequently obtained. Lastly, such presumption is forbidden by the grant itself, which declares on its face, that it is issued subject to the approval of the assembly.

We pass now to the authorities which sustain the conclusion to which an examination of the Mexican legislation has conducted us, in relation to the character of the plaintiff's title.

In the *United States* v. *Cervantes*, my associate gave a construction to the regulations of 1828, and viewed a Mexican grant which had not received the approval of the departmental

assembly, as a mere inchoate title. The case was carried on appeal to the Supreme Court of the United States; but the construction placed by him on the point under consideration was not reviewed, as the appellate tribunal decided the cause on the rulings made by them in the cases of the *United States* v. *Fremont*, and the *United States* v. *Arguello*.

In the *United States* v. *Reading*, Commissioner Hall says, "In the present case, although the claimant had received a formal title from the granting officer, and under it had taken possession of the land previous to the occupancy of the territory by the troops of the United States, and was in the quiet enjoyment of it at the time of the cession by Mexico, yet as something remained to be done to perfect his title, viz., the approval of the departmental assembly, his title must be held to be an incomplete and imperfect one."

In *Edwards* v. *Davis* (3 Texas, 321), the construction of the fourth article of the colonization decree of 18th of August, 1824, which requires the approval of the supreme executive to grants of land within the ten littoral leagues, came incidentally before the court, and they intimated that had the question been properly before them they would have deemed a grant by the governor of Texas and Coahuila a nullity if it had not received the approbation of the supreme government, in compliance with the law.

In the case of the *Republic* v. *Thorne* (3 Texas, 499), the question came up and was decided in accordance with the intimation in the preceding case.

In *Paschal* v. *Perez* (7 Texas, 349), the test is given by which the character of an inchoate is to be distinguished from that of a perfect title—"An imperfect title is one which requires a further exercise of the granting power to pass the

fee in the lands, which does not convey full and absolute dominion, not only against all private persons, but as against the government, and which may consequently be affirmed or disavowed by the political granting power."

In *Hancock* v. *McKinney* (7 Texas, 456), the rule is thus stated: "If the title was perfect it would separate the land in controversy, *proprio vigore*, from the public domain, and the land would cease to be of the vacant land of the State, unless it so became by the terms of the grant, or by some action of the judicial or political authority of the State."

The distinction between perfect and inchoate titles rests on this basis, that is to say, "if the grant was to receive no further act to constitute it an absolute title to the land from the legal authorities, taking effect *in presenti*, it is a perfect title, requiring no further action of the political authority to its perfection."

"But if there remained anything to be done by the government or its officers, such title or right is imperfect, and until it received the sanction of the political authority, it could not claim judicial cognizance." (*Ibid.* 457.)

Applying these tests to the grant under which the plaintiff claims, we cannot fail to conclude that further action was required from the Mexican authorities, viz., the approval of the departmental assembly to perfect it; in the absence of which the title it conveys must be regarded as imperfect and inchoate, and as such incapable of separating any portion of land from the public domain *proprio vigore*.

It has been urged that the decisions of the Supreme Court of the United States in the Fremont and other cases, establish that these Mexican grants pass the fee to the land, and constitute such title as will sustain ejectment.

Whatever may be the conclusion at which that tribunal

may arrive on this point, we see nothing to authorize us to consider that their decisions heretofore made, have gone to the extent contended for.

They have determined that these grants pass a vested and immediate interest, and one which should be recognized by a court of equity; and beyond that we do not understand them to have gone.

To these grants are annexed certain conditions which are clearly subsequent; and if the title had been complete, the non-performance of them could only have been availed of in the manner prescribed by law for the defeat of legal estates subject to forfeiture. But the titles under the Mexican grants being deemed merely inchoate, were treated as such; and the Supreme Court enter into a minute examination of the facts of each case with a view to ascertain its equities, and whether the non-performance of subsequent conditions should forfeit the right of the party to have his claim confirmed. It is improbable that if the court had viewed these titles as legal, they would have placed the confirmation of claims under them on equitable grounds.

In the case of the *United States* v. *Arguello*, Mr. Justice Wayne characterizes, *in totidem verbis*, the Mexican grants which had not received the approval of the departmental assembly, as "equitable titles."

For all purposes of this case it is only necessary, regarding them in a court of law, to fix their character as inchoate.

The action of the Supreme Court of this State, though not very determined, as far as it has gone sustains the conclusion at which this court has arrived, although not for the same reasons.

In *Valejo* v. *Clarke* (3 Cal. 17), the general principle is affirmed, that a Mexican grant without proof of compliance

with the conditions, is at best an inchoate title, and the land passed to the United States, who hold it subject to the trusts imposed by the treaty of cession, and the equities of grantees.

This doctrine was reversed in the case of *Vanderslice* v. *Hanks* (3 Cal. 27); but on the rehearing of the former it was reaffirmed. Such has been the doctrine in the highest court of this State since 1852.

At the July term, 1856, of the same court, in the case of *Gun, Administrator*, v. *Bates & McCartney*, two justices presiding, one of them, resting exclusively upon his construction of the decision of the Supreme Court of the United States, in the Ritchie and Fremont cases, considered the question no longer an open one, and gave an opinion adverse to the doctrine affirmed in *Valejo* v. *Clarke*.

But the other justice, although he concurred in the decision on other grounds, dissented from the reasons assigned by his associate. He says, "I do not think the plaintiff's title sufficient to sustain an action of ejectment." The doctrines announced in 1852 remain still the exponents of the judicial action of our highest State tribunal.

Upon full examination of the Mexican Regulations of 21st of November, 1828, and on the authorities which touch upon the subject, our convictions are, that the title of the plaintiff is inchoate, that the grant under which it is held, segregated no portion of the public domain; consequently, no title to any portion of the land in controversy was divested from the Mexican nation; and lastly, by well settled law, such title gives no standing to the plaintiff in the ordinary tribunals of the country. (16 Howard, 48.)

It is urged by counsel that if the grant under which the plaintiff claims does not pass a legal estate, it is a colorable title which, accompanied by possession, is sufficient to show

the extent of such possession. This principle is applicable to cases where there is no adverse title, or where the defendant does not dispute the seizin of the plaintiff, and is a mere intruder. An illustration of the application of such principle is to be found in *Christy* v. *Scott* (14 Howard, 282), cited by plaintiff's counsel.

The doctrine enunciated there is, that where the plaintiff avers seizin in himself of the premises, and the defendant is a mere intruder, and admits or, what is equivalent in pleading, does not deny the seizin, such intruder may not question the plaintiff's title. "If (say the court) the plaintiff, as his petition avers, was actually seized, and the defendant being an intruder ejected him, it was an unlawful act, and the action is maintainable notwithstanding the State of Texas may have a true title, or may have granted it to another." In the case at bar, the defendants deny the seizin of the plaintiff, and that is an issue to be tried. The plaintiff seeks to establish for himself such seizin by the adduction of a colorable written title, and proof of possession, in the face of an adverse title.

In the cases where a plaintiff may thus recover, the defendants are without color of title—mere intruders. But where the defendants show an adverse title, the party must, as the plaintiff has done in this case, rely upon his title-deed.

Can the defendants be fairly deemed to be mere intruders without color of title? They claim title from the same source whence the plaintiff derives his. That title may upon investigation prove invalid; but surely those who have gone into possession under claim of title, and have expended large amounts of money on the faith of such title, cannot be considered as intruders, and as such estopped from questioning the title of him who seeks to dispossess them.

Independent of an entry under claim of title, there are

circumstances in this case which divest the entry of the character of an eviction.

José Fernandez, a witness, swears he was present with others, when judicial delivery of the mine was given to the assignor of the defendants; that during a portion of the time, Berreyesa, the grantee under whom plaintiff claims, was present; that when informed they were delivering possession of the mine, he said, "he did not care for the *lomas*, but he wanted the valley lands." Another witness, Antonio Suñol, confirmed the foregoing.

Such was the character of the original entry, with at least the apparent authority of a Mexican functionary, under the forms of law, and with no objection made by the grantee. This took place in 1845; since then, the defendants, claiming under that judicial act, have been working the mine, thus delivered to their assignor in the presence of the grantee under whom the plaintiff claims. We allude to this testimony solely with a view to show that defendants cannot be regarded as mere trespassers, and thus make their case an exception to the general rule, which demands that the plaintiff must recover on the strength of his own title. Upon the validity of defendant's title, we do not consider we are called on to decide until the plaintiff's right to sustain his action against them be established.

If we have not ascertained the character of the plaintiff's title to be inchoate, and therefore not the subject of ordinary judicial cognizance, the inquiry arises, whether, if a legal title passed to the land by the grant, it is in this case in the power of the court to locate the granted premises.

If a fee passed, did it attach to all the land included in the boundaries named in the grant, or to the one league it was intended to convey?

It has been urged that, by the terms of the grant, all the lands to the extent of the boundaries mentioned, ascertained by the evidence to be from two to two and a half leagues, vested in the grantee without regard to quantity, which is stated in the grant to be one league; and this, it is contended, is the correct construction of the grant. It is true, that where a conveyance of land is made with specific metes and bounds, although the ambit includes a larger quantity than that mentioned, in the construction of the conveyance mention of quantity is made to yield to boundaries; and it is held that the whole land passes to the grantee. This is a familiar principle of the common law; but its applicability to the case at bar is not perceived.

The rule at common law rests upon the presumed intention of the parties; and in order to carry that intention into effect, in the absence of other proofs on the face of the conveyance, the court will reject quantity in favor of boundaries. Hence, where the latter are so specific and distinct as to indicate with certainty the identity of the land intended to be conveyed, the mention of quantity must yield to boundaries that are thus specific; the latter being deemed more convincing proof than the former, of the identity of the land intended to be conveyed.

In this case, quantity is not mere matter of description. It enters into and is inseparable from the thing granted. There are two conditions annexed to the grant, and forming a part of it.

The second condition requires the party to solicit the respective justice to give judicial possession, by whom the boundaries should be marked out, &c.

Whence the necessity of having the boundaries marked out, if they had been so designated in the grant that the land intended to be conveyed could be identified?

The third condition stated that the land of which mention is made, is one league, referring to the *diseño*, and prescribes that the justice who may give the possession, will have it measured conformably to ordinance, leaving the surplus to the nation, for the uses which may suit.

There was no necessity for any provision in the grant for measurement, nor would there have been a reserve of the surplus, had it heen intended to convey the whole. So far from the grant operating to pass to the grantee a right of possession to the whole, the ordinance to which reference is made in the grant shows that no right of possession passed under the grant, *proprio vigore.*

One of the articles expressly declares, "That no person, although he may have an older grant than others, can himself take possession, survey, or mark out his landed property, unless by judicial authority, and by citation of his neighbors; therefore whatever is done otherwise shall be null, of no value or effect." (Ordinanzas de Tierras y Aguas, 94.)

There can be little doubt that the interest intended to be conveyed was to a certain quantity of land; and the name of the ranch of which it formed a part, and its general boundaries, given to indicate the tract from which that quantity was to be taken by the agent of the grantor and, after such segregation, possession thereof delivered by him to the grantee.

By reference to the *espediente* of the plaintiff, it will be seen he was aware of the quantity of land conveyed in his grant.

By a petition presented by him on the 10th of February, 1844, to the governor, he stated that he had received a grant, and had returned it because it had subjected him to one league, whereas he had solicited two; and he requested that a dispatch might be sent him for two leagues.

So far as the evidence goes, there is no reason to suppose

his prayer was acceded to; and the grant under which plaintiff claims is believed to be the one once repudiated by him, because it subjected him to one league.

On this petition there is an indorsement by M. Jimeno, the secretary, which shows the views entertained of the grant by the Mexican authorities.

It recites that, "to the person representing these, was granted a single league, as is shown in the respective *espediente;* and if his pretension is to have more extension, it would be proper for the justice of the pueblo of San Jose to make report, after summoning the adjoining neighbors, especially the neighbor Justo Larios, with whom he formerly had a dispute."

We have heretofore had occasion to express our views in relation to the system of granting lands which formerly existed in California. Neither the grantor nor the grantee had the means of defining quantity by measurement.

No actual surveys, under the Mexican rule, have come to the notice of this court; and we believe the true condition of things as it existed, is correctly stated in the instruction by the Department of the Interior of the United States to the board of commissioners, on 11th September, 1851: "There are, it is believed, no Spanish or Mexican plats of survey extant, of lands in California; no actual surveys, so far as this office is advised, having ever been executed during the sovereignty over the country of either Spain or Mexico."

Under this state of affairs, metes and boundaries were inserted in the grant merely to indicate the general locality, from which the number of leagues conveyed were intended to be taken. The grantor presented a rude sketch, dignified with the name of a *diseño* or map, on which certain outward boundaries were described, without regard to distances, and in some instances without true indications as to their bearings, the

prominence of which objects seemed to have been the inducement for calling for them.

Within these exterior boundaries was the land needed; and the petitioner, in his application for it, described it in effect as so much land bounded by those exterior limits; and by such description it was granted.

The grantor, equally ignorant of quantity, guarded the public interest by specifying the number of leagues granted, reserving the surplus to the nation, and protecting that surplus by securing its segregation before the owner could obtain legal possession of the land granted.

In a word, conjectural estimates were substituted for actual surveys; and in such a system the mention of quantity, as a word of limitation, is more significant than in a common-law conveyance.

To apply rules of construction which regulate the system of common-law conveyancing, in all cases, to one so anomalous as that which existed in California, would be impracticable, and defeat the object at which the common law aims viz., to carry out the intention of the parties.

The rule of construction as laid down by the Supreme Court of the United States is, that the words of a grant are always construed according to the intention of the parties, as manifested in the grant by its terms, or by reasonable and necessary implication, to be deduced from the situation of the parties and the thing granted. (6 Peters, 740.)

Submitted to this test, we cannot consider that the whole land passed in this case.

We have not overlooked the fact that it was customary to annex similar conditions, as to quantity, to Mexican grants indiscriminately. To those where no surplus of land could exist, as well as to those where the quantity included in the general locality greatly exceeded that intended to be granted.

But such usage affords no good reason to regard all conditions as to quantity, annexed to every species of grant, as formal and inoperative.

In one class of cases, while the insertion of such conditions evidence an intention to reserve a portion of the land included in the outward boundaries, such evidence is rebutted by the fact that no surplus could remain, or was contemplated to exist. In the other, the existence of a large surplus over the amount intended to be granted, clearly evidenced that there was something more than form which led to the annexation of conditions as to quantity. In each class of cases it is the duty of the court to apply the rule of construction given by the Supreme Court of the United States, that a grant is to be construed according to the intention of the parties, as manifested by the words of the grant, aided by reasonable implication, deduced from the situation of the parties and the thing granted. (6 Peters, 740.)

We do not desire to be understood to mean, that when land is sufficiently described by boundaries, and the quantity of land included within them approximates to the number of leagues granted so nearly that the excess might be deemed to be covered by the words "more or less,"—that we would give to the conditions annexed to such a grant, restricting quantity, the consideration we feel constrained to give to cases where there is a large excess over the quantity intended to be conveyed.

All that has been said in relation to the question whether the whole land described in the grant, in this case, passed to the grantee, has been predicated upon the assumption that a fee passed on the execution of the grant to the grantee. But our conclusion, as above stated, is that the grant, never having been executed by the granting power, according to law, divested

no portion of the land from the Mexican nation, and consequently passed no legal estate to the grantee, on which this action can be sustained.

In the view entertained by the court on this point, it is perhaps unnecessary to consider the remaining suggestions of plaintiff's counsel, in relation to the location of the granted land. But it has been argued with zeal by counsel, and demands, for that reason, some attention.

It is urged, that if the whole land did not vest in the grantee, the plaintiff is entitled to one league; and that the land is sufficiently described to enable the court to locate it. That the western boundary, the dividing line between the ranchos of Berreyesa and Justo Larios, is sufficiently defined; and, making it the base line, the league may be run off.

Days have been consumed in ascertaining how this line should be run; and after the closest examination it is not found to be more certain than the northern line; and this latter is the boundary first named in the grant, whereas the western is the last one called for. Between these two lines, a selection may be attended with serious consequences to the respective parties, a selection we do not think within the appropriate province of this court to make.

It is evident, that the grant is subject to be located at different places by the selection of different base-lines; and such fact precludes the action of this court.

In *Stanford* v. *Taylor* (18 Howard, 409), the concession was for forty by forty arpens in extent, along the river "Des Peres," from the north to the south, which is bounded on the one side by the lands of Louis Robert, and on the other by the domains of the king, &c.

The Supreme Court say, in relation to this concession, which had been confirmed and thus become a perfect title, "On which

side of Louis Robert's land it is to lie, we are not informed further than that it is to lie along the river from north to south.

"The uncertainty of out-boundary in this instance is too manifest, in our opinion, to require discussion to show that a public survey is required to attach the concession to any land."

The decision in this case turned upon the point that the land admitted of two locations. It is settled law that—"where a claim to a specific tract of land has been confirmed according to ascertained boundaries, the confirmee takes a title on which he may sue in ejectment;" but where the claim has no certain limits, and the judgment of confirmation carries along with it the condition that the land shall be surveyed and severed from the public domain and the lands of others, then it is not open to controversy that the title attaches to no land; nor has a court of justice any authority in law to ascertain and establish its boundaries, this being reserved to the executive department." (18 Howard, 409.)

The one league of land in this case, from the description of the outward boundaries, admits of different locations; and the grant itself carries with it a condition calling for a survey.

The interposition, therefore, of the executive is necessary to give a separate existence to the specific land to which the estate can attach. (18 Howard, 473.)

The right of the plaintiff is a *jus ad rem*, not a *jus in re*. He is certainly entitled to one league of land, but he is entitled to it on the terms mentioned in his grant: the league was to be severed by the grantor.

The law which existed at the time of the grant and referred to by it declared, as we have seen, any possession a nullity unless previously measured by the proper officer of the government.

No public survey of the land had been made anterior to

the treaty of Guadalupe Hidalgo. By that instrument the land passed to the United States, subject to the plaintiff's right, and with it passed also the right of segregation.

This is a political act, and belongs not to this court.

In Fremont's case, the Supreme Court say, "Under the Mexican government, the survey was to be made or approved by the officer of the government, and the party was not at liberty to give what form he pleased to the grant." . . . . .

"The right which the Mexican government reserved, to control this survey, passed with all other *public* rights to the United States; and the survey must now be made under the authority of the United States; and in the form and divisions prescribed by law for surveys in California, embracing the entire grant in one tract."

But setting aside all considerations in relation to the power of this court to locate the granted premises, we place our decision on the ground that the documentary title produced by the plaintiff himself must control his rights, and that under it no legal estate passed which can maintain the present action.

The attorneys for the defendants will submit the draft of a verdict in favor of the defendants for the signature of the judges.

Howard & Goold and *E. W. F. Sloan*, for plaintiff.
Halleck, Peachy & Billings, for defendants.

BAYERQUE *et al. v.* THE CITY OF SAN FRANCISCO.

Circuit Court, U. S., July Term, 1856.

A WARRANT issued by the controller of a city, whose payment is restricted to a particular fund, cannot be regarded as a bill of exchange.

Trading corporations may, independently of statute, issue negotiable paper in the course of their business.

If admitted in its broadest interpretation, it cannot apply to a warrant issued by the officers of a municipal corporation.

It is rather the conditional payment of a debt already created, than the creation of a new one, or the expression of a new promise.

The present action is brought by the plaintiff as holder of certain warrants alleged to have been assigned to him for a valuable consideration. The warrants are in the following form:

$1,000. CITY COMPTROLLER'S OFFICE,
SAN FRANCISCO, 1854.

City Treasurer,—Pay to Jesse L. Whitmore, or bearer, the sum of one thousand dollars, for grading &c. Powell street from Washington to Bay, out of the Street Assessment Fund.

S. R. HARRIS,
Comptroller.

The facts necessary to be set forth are given in the opinion of the court, on the demurrer filed to the complaint.

MCALLISTER, J.—Various grounds of demurrer have been assigned. A consideration of the third and last, will dispose of the case on the present pleadings. It is in these words, "That

the instruments in law do not constitute any evidence of indebtedness, nor does it appear from the complaint that the defendant is otherwise indebted to plaintiff. Nor do the said instruments establish in law any obligation or liability on the part of the defendant."

The defendant is a municipal corporation, owing its existence to a charter, through which "it moves, and breathes, and has its being." It stands on a different footing from an individual. The latter, may do all acts and enter into all contracts not prohibited by law; the former, created for specific purposes, can make no contract forbidden by its charter, or into which it is not authorized to enter by that instrument. Nor is a corporation, when an action is brought against them on a contract, estopped from denying their competency to make it; for if so, the estoppel would apply equally to the other contracting party, and the limitations upon the power of the corporation would be of no avail. The authority of the city to issue the warrants in this case, is placed upon the *third* section of its charter. It is in these words. "Every warrant upon the treasury shall be signed by the comptroller, and countersigned by the mayor, and shall specify the appropriation under which it is issued, and the date of the ordinance making the same. It shall also state from what fund and for what purpose, the amount specified is to be paid." It will be observed, that these warrants, in addition to the signatures of the mayor and controller, and a statement from what fund and for what purpose the money was to be paid, must also specify the appropriation under which it is issued, and the date of the ordinance making the same. This cannot be regarded as matter of form. It is a substantial requirement, and inserted to carry out the policy contemplated to be pursued for the protection of the public from the recklessness of city officers, and the collusion with them of third parties. The

7th section of the charter inhibits the common council from issuing or putting in circulation any paper or design as a representative of value or evidence of indebtedness; and the 8th section declares, that no money shall be drawn from the treasury unless the same shall have been previously appropriated to the purpose for which it was drawn; and, with a view to enforce that provision and guard against the infidelity of officers of the corporation, and the fraud of third parties, the existence of the previous appropriation, and the date of it, must be specified in the warrant. In case at bar, while some of the warrants, amounting in the aggregate to $14,500, are issued in conformity to the act, the balance—and by far the larger amount—do not specify the appropriation under which they are made, or issued, or the date of the ordinance making the same. These cannot be deemed to have been legally issued, nor would the treasurer have been authorized to have paid them. They cannot be recovered on as *warrants*, even in the hands of the original holder. But the plaintiff takes a position, which, if sustainable, covers all the warrants. He sues upon them exclusively. There is but one count in the complaint. He does not sue upon them as agreements setting forth the consideration; but as negotiable, as bills of exchange, which imply a consideration. We do not regard them as such. The defendant is not a private, trading corporation, but a public, municipal one. In the distribution of its powers among its agents, the legislature has interposed a check upon the officer having the custody of the public money, by authorizing him to pay only such warrants as purport on their face to have been issued under some previous appropriation; and the date thereof must be given. None other could lawfully issue. They are merely what they purport to be when legally issued, *warrants*, or authority to the officer to pay out public money

in his custody. They are drawn by one officer of a corporation upon another, and intended rather as a conditional payment of a pre-existing debt already audited, than as instruments creating a new debt, or expressing a new promise. They are designed to give facility, regularity, and security in the disbursement of the public money. They are intended as a check on the treasurer by forbidding any payment unless authorized in a particular manner, and to facilitate the transaction of the business of the corporation by defining strictly the duties of their functionaries. To the holder they are of use, by enabling him to draw money from the treasury when his debt has been allowed by the proper officer; and probably he might compel by *mandamus* the treasurer to pay the warrants in case, having funds, he refuses. But in no sense do they constitute a promise on the part of the city to pay, as the drawer of a bill of exchange. There are other considerations which conduct to the conclusion that these warrants cannot be treated as bills of exchange. A fatal objection is the fact, that upon their face the payments are restricted to, and must come out of a particular fund. It is true, that the mention of a particular fund out of which a payment is to be made, will not in some cases prove fatal to the character of the instrument as a bill or note. But it is confined to that class of cases where the mention of a particular fund is directory, and reference made to it with a view simply to enable the drawee to look to his reimbursement. But in all cases where the payment is expressly limited, and is to come out of a specific fund mentioned, however ample it may seem, it is fatal to the character of paper as a bill of exchange. (Parsons' Mer. Law, 87.)

In *Dawkes* v. *De Lorane* (3 Wils. 207), the court thus defines the *essential* qualities of a bill of exchange, "It must carry with it a personal credit given to the drawer, not con-

fined to credit upon any thing or fund,—it is upon the credit of a person's hand who negotiates it; he who takes it, does so upon no contingency except the failure of the general credit of the person drawing or negotiating it."

In *Jenney* v. *Herle* (2 Ld. Raymond, 1361), A drew on B, to pay plaintiff on demand a sum of money out of a particular fund mentioned,—held to be a mere appointment for the payment of money out of a particular fund; and where A drew on the agent of a regiment, to pay an amount out of his growing subsistence,—held not to be a bill of exchange, "because the money was payable out of a particular fund." In *Yates* v. *Groves* (1 Vesey, jun. 280), A drew a bill "payable out of the purchase-money of a house." This order, said the lord chancellor, "is not a bill of exchange, being payable out of a particular fund." In *Van Vacter* v. *Flack* (1 Smedes & Mar. 393), the plaintiff sued on a bill made payable out of the notes left in drawer's possession. "This instrument," say the court, "is not a bill of exchange, because payable out of a particular fund; it is to be distinguished from that class in which the particular fund is mentioned merely as a direction to the drawee how he may reimburse himself." The case of *Kelley* v. *The Mayor, &c.* (4 Hill, 263), illustrates the distinction between the two classes of cases. It was there held, that a draft signed by the mayor, and directed to the treasurer, was a bill of exchange. If this be law, it does not touch the case. The payment of the money was not confined to a particular fund. The words as to payment were "and charge to Bedford assessment;" the court say, "The bill was not restricted to the particular fund arising from the Bedford-road transaction, yet for reimbursement the treasurer was directed to charge that fund." On that ground the instrument was considered a bill. The form of the draft in that case was also decided to have

complied substantially with the statute. This is unlike the case at bar. In *Lake* v. *Trustees of Williamsburgh* (4 Denio, 520), a *draft* was drawn for a sum of money to be charged to the account of the Union Avenue. The payment was not to come out of any particular fund; and the court say, "If it was not a sealed instrument it *perhaps* might be regarded as a bill of exchange." This intimation of a "*perhaps*" is sustained by a reference to *Kelley* v. *The Mayor, &c.* (4 Hill, 263). When we turn to the latter case we find the following proposition: "Independently of any statute provision, a corporation may issue negotiable paper for a debt contracted in the course of its proper business." To sustain this proposition reference is made to the case of *Moss* v. *Oakley* (2 Hill, 265); and in this case reliance is placed on the case of *Mott* v. *Hicks* (1 Cowen, 513), and to *Barker* v. *Mechanics' Fire Ins. Co.* (3 Wend. 94). All these cases on which reliance was placed for the general proposition above stated, "that a corporation, independently of statute, may issue negotiable paper in the course of its proper business," are trading and business corporations; and the authorities above cited by counsel for plaintiff do not, for that reason, apply to the defendant, who is a public and municipal corporation, whose powers are confined strictly by its charter. But they are all unlike this case in the fact that in no one of them was the payment of the money restricted to a particular fund.

The *demurrer* in this case must, therefore, be sustained.

Parsons & Ganahl, for complainants.
H. H. Byrne, for defendant.

TURNER AND OTHERS, *Appellants*, *v.* THE SHIP "BLACK WARRIOR," AND MURPHY, *Appellees.—In Admiralty.*

Circuit Court, U. S., July Term, 1856.

THE bill of lading is *prima facie* evidence that the goods were shipped in good condition; and if not delivered in like condition, the *onus* lies on the carrier of proving the damage was the result of one of the causes excepted against.

The carrier is still liable, if the damage could have been avoided by skill and diligence.

So soon as the carrier has established the damage as having come within the exception of the bill of lading, the burden of proof is on the shipper to prove want of skill or diligence.

The weight which is due to the bill of lading as to the condition of goods, depends upon their nature and character.

When a chemical cause is assigned for damage to goods, evidence of experts is admissible.

The proofs must be limited to the averments in the answer.

This case is an appeal from a decree rendered in favor of the libelants by the District Court of the United States for the Northern District of California. The libel propounds that in the year 1855, the libelants shipped on board the "Black Warrior," certain hogsheads and barrels of pure spirits, in good order, and well-conditioned, at ———, to be carried thence to San Francisco; and that, notwithstanding libelants have paid freight and primage on said spirits, they have not been delivered in good order; but, by the carelessness of the master and crew of said vessel, have been destroyed, with the exception of a small quantity remaining in one of the said

barrels. The answer affirms the spirits were well stored; denies all carelessness, and avers that if any damage has accrued to them, it is owing to the unfitness and defects in the barrels and casks. To this answer, a *replication* was filed.

McAllister, J.—That damage has accrued, and the amount thereof, are not disputed in this case. The only question is, Whence arose this damage? No copy of the bill of lading has been given in evidence. It is, however, admitted to be in the usual form. It admits that the spirits were shipped in good order, and this imposed on the carrier the duty of delivering them in like condition; and if not so delivered, the *onus* of proving the damages as the result of one of the causes excepted against in the bill of lading, rests upon the carrier. Has he done this? If he has established any such fact, he still may be made liable, if such peril could have been avoided by skill and diligence. But so soon as the carrier has established the cause of damage to have been within the exception of the bill of lading, and the shipper seeks to charge him with negligence, the *onus* of proving such negligence rests upon the shipper. *Clark* v. *Barnwell* (12 Howard, 272, 280, 281, 287).

The first inquiry is, Has the carrier established by proof, that the damage was the result of a cause with which human agency had nought to do; in other words, that it was the result of one of the causes excepted by the bill of lading? The allegation in the libel is, that the carelessness of the carrier was the cause of damage. Now, if the carrier does not prove that the damage accrued from one of the excepted causes, the law fixes upon him negligence. To elude a recovery in this case, in his answer he avers that the damages (if any) arose from the unfitness and defects of the barrels and casks.

In determining this issue, the character of the articles transported, and their exterior condition, must be considered. They were not silks, inclosed with exterior and interior wrappers, the exterior of which might be in good condition, while the interior might be unsound and damaged,—a fact difficult or impracticable to be ascertained, even on inspection. Nor were the articles like spools of thread, packed in small wooden boxes lined with paper, and these small boxes again in a larger box lined, with paper between the boxes, as in the case of *Clark* v. *Barnwell* (12 Howard, 279). Had the articles in this case been similar in character to those, the acknowledgment in the bill of lading would not have been satisfactory evidence of their condition. These were hogsheads and barrels, and their unfitness and defects were attempted to be established by proof that they were not bound with iron, and that some of the hoops upon them were molded. To this there was opposing testimony, by persons who had inspected them, which established the fact they were equally good as the average casks and barrels ordinarily used for the transportation of spirits. The district judge,—who, it seems, had submitted to his personal inspection some of these casks,—from a view of them, and from the whole testimony, came to the conclusion that the fact of the defect in the casks was not made out. I do not think that conclusion should be disturbed, particularly where, as in this case, the carrier has admitted the articles were in good condition, in the bill of lading, and the character of the article and of the defects alleged, is such as was capable of ready detection on even casual inspection. Under such circumstances, the acknowledgment of the master, fortified as it is by the parol testimony of persons who have inspected the articles, authorizes the conclusion that the carrier has not established the defense set up on this ground. Here this case

might end. But a second ground of defense has been taken in the argument of counsel, no foundation for which is laid by any averment in the answer. That ground is, that there was an evaporation of the spirits, a chemical cause, the work of natural laws, which produced the damage, and is a cause excepted against in the bill of lading. We have seen that the *onus* of proof on this point is with the carrier. It is not until he has established the fact, that the necessity of proving negligence is imposed upon the opposite party. In this case, no attempt has been made to prove the probability of evaporation. The question is a scientific one; and if the intention of the party had been to rely upon it, he should have procured the testimony of experts in relation to it. In *Rich* v. *Lambert* (12 Howard, 347), the respondent rested his defense on the ground that the cotton thread (in that case) had been damaged by the dampness of the hold of the vessel solely, and he proved the fact. The court say, All the witnesses concur in the conclusion that the damage was occasioned by the humidity of the ship's hold, producing mold and mildew. In the case at bar no one witness has sustained this theory. The argument is, that if the barrels were good and well stowed, the inference is that the damage was occasioned by partial evaporation, which disabled the barrels to resist external pressure, and therefore they must have leaked. Now, this is a theory. No evidence has been given to establish it as a fact; no evidence to determine what given quantity in a certain-sized barrel will evaporate in a given time, or how much will evaporate before the barrel will probably leak. No one witness, an expert or one practically acquainted with the business, has given his conclusions upon this subject. Perhaps the reason is that it is an afterthought, for nothing of the kind is averred in the answer. It states that if any damage occur-

red it arose from the carelessness of libelants, viz., the shipping of the barrels in bad order, not in condition to be shipped. The single issued raised is the fitness of the barrels. The bill alleges the articles were in good order; the answer avers they were "unfit to be shipped." This question has been decided against the respondent; and he seeks to evade a recovery on a distinct ground from that taken in the answer. In that he attributed the damage to the act of the respondent; he now attributes it to an inevitable cause—evaporation. He cannot allege one cause and prove another.

In *Rich* v. *Lambert* (12 Howard, 356), the court say, "The libelants charge the damage to the goods to have been occasioned by the improper storage of the cargo. This is denied in the answer; and, as the recovery must be had, if at all, according to the allegations in the pleadings, it is incumbent on the libelants to maintain this ground by proof." Again, they say, "To permit the libelant to recover upon this ground (not stated in the bill) would be a departure from that upon which they have chosen to place their right of action in the pleadings." (*Ibid.* 369.)

Mutatis mutandis, it may be said that to permit the respondent to rest his defense on the ground that the damage was the result of a natural cause, would be a departure from the ground on which he placed his defense in his pleading.

In view of all the testimony, and of the law applicable to it, the conclusion to which I am arrived is, that the decree of the court below must be affirmed. It is therefore ordered that a decree be entered affirming in all respects the decree of the court below.

Julius K. Rose, for appellant.
Manchester & Hodges, for appellees.

TOBIN *v.* WALKINSHAW AND OTHERS.

Circuit Court, U. S., July Term, 1856.

Acts and declarations of a party as to his intention in remaining in or removing from a country, though not simultaneous with his act, are, under special circumstances, admissible to prove the intention with which he acted, if made *ante litem motam*.

Where the intention or knowledge of a party becomes a material fact, acts and declarations, although collateral to the main subject, still, having a bearing upon it, are admissible as evidence.

By a principle of international law, on a transfer of territory by one nation to another, the political relations between the inhabitants of the ceded country and the former government are changed, and new ones arise between them and the new government.

The manner in which this is to be effected, is ordinarily the subject of treaty.

The contracting parties have the right to contract to transfer and to receive respectively the allegiance of all native-born citizens, but the naturalized citizens, who owe allegiance purely statutory, when released therefrom, are remitted to their original *status*.

This action was ejectment, and defendants pleaded to the jurisdiction of the court, on the ground that Alexander Forbes, one of the defendants, was not an alien and subject of Great Britain, as alleged in the complaint. Issue was taken by replication, and submitted to the jury, who returned a verdict in which they found that James Alexander Forbes, one of the defendants in this case, was, at the time of the institution of this suit, an alien and subject of Great Britain. A motion is now made to set aside the verdict of the jury, on the grounds,—1. That testimony as to the acts and declarations of the party

done and made *ante litem motam*, tending to show what country he elected to adopt, were improperly permitted to go to the jury. 2. That the verdict was contrary to the facts. Those facts are detailed in the opinion of the court.

McAllister, J.—To sustain their plea, defendants relied on the admitted facts, that said Forbes, a native of Great Britain, was at the date of the treaty of Guadalupe Hidalgo a naturalized citizen of Mexico, that he has continued to reside in California since the execution of the treaty, and that he has never made any declaration of an intention to retain the rights of a Mexican citizen. These facts, it was contended, with the subsequent admission of California into the Union, fixed at once and by mere operation of law, the *status* of American citizenship upon the defendant Forbes. To disaffirm the plea, and sustain the allegation that defendant was an alien, plaintiff proved that in 1851 the defendant, against whom two actions at law had been instituted in the courts of this State, petitioned for their removal, and had them removed, from the state courts into the District Court of the United States for the Northern District of the State of California (then exercising circuit-court powers), on the ground, that he was, at the time, an alien, and subject of the kingdom of Great Britain. That to accomplish that object, he executed bonds reciting that fact, and his attorney, under his instructions, swore to the fact. It was also in proof, that in the same year (1851), a suit was brought on the equity side of said District Court; and to the bill filed the answer of defendant admitted that he was at that time an alien, and subject of Great Britain. Lastly, it was deposed by a witness whose testimony was not attempted to be impeached, that the defendant, in 1851, told him he was not a citizen of the United States, that he did not intend to become one at present, because

he desired to be able to litigate in the courts of the United States. To the testimony sustaining the plea, objections were made by attorney for defendants, on the ground of incompetency, and were overruled by the court. This verdict is in the opinion of the court, fully sustained by the testimony given, and the only ground on which it can be set aside is, that the evidence was improperly admitted to go to the jury. In the view the court will hereafter take of this case, the question of the competency of the testimony might be dispensed with. But as it may not be inappropriate to allude to this testimony, the court will briefly advert to the objections made to its competency.

The argument of counsel is, that the provisions of the treaty of "Guadalupe Hidalgo," with the residence of defendant in California, being a naturalized citizen of Mexico, for a year after the date of that instrument; the fact that no evidence was produced to prove defendant ever made a declaration of his intention to retain the rights of a Mexican citizen, together with the admission of California into the Union, all fixed, once and forever, upon the defendant the *status* of an American citizen, which cannot be altered by the testimony. The consideration of this argument involves, to some extent, a construction of the article of the treaty of Guadalupe Hidalgo, upon which it is predicated. This article stipulates as to those Mexicans who should prefer to remain in the ceded territory, that they may either retain the title and rights of Mexican citizens, or acquire those of American citizens; but declares that they shall be under the obligation to make their election, within one year from the date of the exchange of the ratification of the treaty, and those who shall remain after the expiration of that year, without having declared their intention to retain the character of Mexican citizens, shall be considered to have elected to

become citizens of the United States. We will first consider this article as giving a right of election. If he elected to retain the character of a Mexican, he was to manifest it by a declaration, whether in writing, verbally, or by matter of record, is not stated. The treaty is more indefinite as to the manner in which he is to manifest a contrary intention. In fact, it prescribes no way in which he is to manifest his intent *not* to become a citizen of the United States. The omission to make a declaration to continue a Mexican, and his residence for a year after the date of the treaty, would be prima-facie evidence of his election to become a citizen of the United States. There is also one rule of evidence prescribed by the treaty as to his intention, the fact of his remaining in the country without having made any declaration of his intention. This cannot be deemed conclusive testimony, for election presupposes intention; it is an operation of the will. If the legal conclusion be absolutely fixed upon him in despite of the intent or the purpose of his residence, what becomes of the right of election?

In *Inglis* v. *Sailors' Snug Harbor* (3 Peters, 123), the court say, "How, then, is his father, Charles Inglis, to be considered?—was he an American citizen? He was here at the time of the Declaration of Independence, and, *prima facie*, may be deemed to have become thereby an American citizen. But this prima-facie presumption may be rebutted; otherwise there is no force or meaning in the right of election." Considering, then, for the present, that the right of election had been clearly given to the defendant, the question is, not what do his feelings or interests now prompt him to do, but what did he do within the year his right of election existed. On one side, we have the prima-facie evidence prescribed by the treaty, his continued residence, and the fact that in the year 1851 he had voted at a corporation election. To counteract these, we have solemn legal instruments

executed by defendant, describing himself as an alien and subject of Great Britain. Availing himself of that allegation, he removed cases brought against him from the State to the Federal courts, filing an answer in a court of equity, in which he swore to the fact—his attorney, under his instructions, swearing to the same fact, and himself not only stating that he was not a citizen of the United States, but did not intend to be, as he wished to be able to litigate in the courts of the United States. To all these acts and declarations, it is urged, they are incompetent evidence, because done and said after the expiration of the time within which the right of election was to have been exercised. The general rule of evidence undoubtedly is, that acts and declarations not done and made simultaneously with the *factum probandum*, and not forming part of the *res gestæ* are inadmissible. Yet if an alleged fact cannot exist together with other facts, the proof of the latter facts disproves the existence of the former. If the declarations and acts of Forbes in 1851 were established, they would necessarily disprove the alleged fact that he had previously elected to become a citizen of the United States. They were, therefore, to be left to the jury. It is settled, that the declarations and acts of a party are admissible to qualify and explain his intention in removing, or the character of his residence, in a question of domicil. And it is to be borne in mind that we are considering the admissibility of this testimony in view of a construction of the treaty, which gives to a party a right to elect whether he will retain the title and rights of a Mexican, or take those of a citizen of the United States. To exercise this right, there was no necessity, under the treaty, that there should have been an actual removal, nor is such actual removal the only evidence that the right of election has been exercised. In the case of *Inglis* v. *Sailors' Snug Harbor* (3 Peters, 123), the court say, "It surely cannot be said that nothing short of actually

removing from the country before the Declaration of Independence will be received as evidence of election." And the court proceeds to consider the acts of the party, adduced as evidence to qualify and characterize the remaining in the country. Now, inasmuch as other acts beside that of removal may be received as evidence of the manner in which the right of election was exercised, the court considers the testimony competent. In the case at bar, defendant remained in this country, and, with a view to ascertain his intention in remaining, his acts and declarations, though made subsequently to the time, were left to the jury to find in what manner he had elected.

But there is another aspect in which the testimony may be received. It constitutes by reason of its character an exception to the general rule, that declarations and acts not forming a part of the *res gestæ* are inadmissible. That exception applies to cases where the intention of a party becomes material, in which cases facts evidencing the intention, although collateral and foreign to the main subject, still, as having a bearing upon the question of intent, are admissible. In *Wood* v. *The United States* (16 Peters, 360), it is said, in questions "where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment."

Now, if the right of election was awarded to the defendant, and it was not the intention by the rule of evidence the treaty creates, to force upon the party who remained in the country American citizenship contrary to his intent (which we think is not the case), then the *intent* of the party in

remaining becomes a material question; and matter *en pais*—such as the acts and declarations of the party—although not forming a part of the *res gestæ*, are admissible so far as they serve to show the intent.

In the Inglis case, hereinbefore cited, the court went into the consideration of the acts and doings of the party for a series of years, to ascertain what election he had made at a particular time anterior to them; and say, "Those lead to the conclusion that it was the fixed determination of the party, at the Declaration of Independence, to adhere to his native allegiance."

In fact, intent is best known to the party, is often secret until developed by acts and speech. "*Acta exteriora indicunt interiora secreta.*" Lastly, this testimony is admissible as admissions made by a party through his declarations and acts spoken and done *ante litem motam*, and opposed to the right he now seeks to maintain.

But the court does not consider that the right of election was given to the defendant by the Treaty of Guadalupe Hidalgo; and therefore the discussion as to the admissibility of testimony might have been dispensed with. The intention of the 9th article of that instrument was to fix the *status* of all *Mexicans* who should prefer to remain in the ceded territory. By a principle of international law, on a transfer of territory by one nation to another, the relations of the inhabitants towards each other undergo no change; but their relations with their former sovereign are dissolved and new ones between them and the government which has acquired their territory are created. The same act which transferred their territory, transfers the allegiance of those who remain in it, and the law which may be denominated political is changed. *American Insurance Co.* v. *Canter* (1 Peters,

542). This right to change the political relations of the inhabitants of a ceded territory arises out of the character of those relations as recognized by the law of nature and nations. Birth binds man by the tie of natural allegiance to his native soil, and such allegiance gives, by the principles of universal law, to the country in which he was born rights unknown to mere voluntary or statutory allegiance. Upon the right to transfer this natural allegiance has been engrafted, this right of election in the party whether he will retain his allegiance to his old sovereign, or pay allegiance to the new. Should he elect to retain his allegiance, he must do so without injury to the new government; and such election is generally accompanied by removal from the country, unless regulated by treaty. The object of the treaty of "Guadalupe Hidalgo" was to regulate the exercise of this right of election by such parties as by the principles of international law were subject to their jurisdiction as contracting parties. The Mexican government stipulated for a right for *Mexicans* resident in the territory, to elect at any time within a year after the date of the treaty to retain their title and rights as *Mexicans;* the government of the United States guarded against the abuse of the right, by limiting the time within which it was to be executed, and stipulating that if the election was not made within the time limited, they should be considered as having elected to become citizens of the United States. The right of the two governments thus to stipulate in relation to native-born Mexicans, under the law of nations, is unquestionable. It was evidently proper that the *status* of all such should be fixed. If they were neither to continue Mexican citizens nor become citizens of the United States, a whole people would become disfranchised. They would have no *status* as citizens, owe no allegiance, and be left in the anomalous position of a people without a

country. / Not so with the defendant Forbes. So soon as he had been released from the voluntary allegiance to Mexico, he was remitted to his original *status*. No power existed in one government to transfer, or in the other to receive, the voluntary or statutory allegiance of a naturalized citizen. Neither had the right to say to such, "You shall continue your allegiance to Mexico, although she has conveyed it away; or you shall become a citizen of the United States." The allegiance of the naturalized citizen is the offspring of municipal law. Unlike natural allegiance, its support does not rest upon the law of nature and the code of nations. The only relations that Mexico or the United States could change, were those arising from those sources. / Nor does the language of the treaty authorize the conclusion that the contracting parties intended to include within the word "*Mexicans*" naturalized citizens of foreign countries. The language of the treaty of Guadalupe Hidalgo, differs materially from that used in the treaty by which Florida was acquired in 1819, and the treaty of Paris, in 1803, by which Louisiana was ceded to the United States. In the 8th article of the treaty of Guadalupe Hidalgo, *Mexicans* are only mentioned as entitled to the rights of election. The whole of this article refers to *Mexicans;* and the 9th article speaks of "*Mexicans*" only, and provides, that those who do not preserve the character of Mexican citizens shall be subsequently incorporated into, and become entitled to all the rights of citizens of the United States. Naturalized citizens are nowhere included *eo nomine*, within the provisions of the treaty; and in the opinion of the court, it was not intended to include them. This construction of the treaty is sought to be defeated by the assumption, that the change in the political relations of the inhabitants of the ceded territory was contemplated to

be made by the treaty with their consent, by giving to them the right of election; hence, that it is to be reasonably concluded that naturalized citizens were intended to be included in the term "*Mexicans.*" The answer is, first, it is a violence to the language of the treaty so to construe it; secondly, the allegiance of the naturalized citizen was not a subject of transfer between the contracting parties; and thirdly, the argument surrenders the whole question; because if the defendant was included in the treaty, his consent was essential to entitle him to exercise the right of election. This is the very question found by the jury on the trial of the issue of election or no election, upon evidence the court considers competent on the trial of such an issue. In a word, if the defendant Forbes, a naturalized citizen of Mexico, is to be brought within the provisions of the treaty because he consented to them, then his consent, involving intention and election, is an issuable fact which has been found against defendants by the jury. But in the opinion of the court, the election was given only to *Mexicans* who remained in the ceded territory longer than one year after the date of the treaty, who were during that interval to select to retain Mexican rights, or be considered citizens of the United States. Both governments had the right so to negotiate in regard to Mexicans; but in relation to the defendant Forbes, a naturalized citizen, his voluntary allegiance might be released by Mexico—not transferred. On his release, he was remitted to his original *status* of a British subject, derived from his birth; and the courts know no principle of law which would authorize the government of the United States to compel the transfer of the defendant's voluntary allegiance from Mexico to themselves. The contracting parties did not intend to do so. The court considering the defendant without the provisions of

the treaty, his claim to be a citizen of the United States under them cannot be sustained; and he stood at the execution of the treaty, and now stands, where his acts and declarations and original *status* have placed him—an alien, and subject of Great Britain.

The motion to set aside the verdict in this case, must be overruled.

Howard & Gould and E. W. F. Sloan, for complainants.
Peachy & Billings, for defendants.

THE UNITED STATES *v.* DURKEE.

Circuit Court, U. S., July Term, 1856.

THE essential requisite of larceny is the *lucri causa*.

Held, if the prisoner took and carried away the muskets with intent to appropriate any of them to his own use, or permanently to deprive the owner of them, such taking is larceny;—

If the taking was with the sole intent to prevent the use of them upon himself or his associates, it is not larceny.

This was a case of an indictment under the 3d section of the act of 15th May, 1820. (3 Statutes at Large, 600.) It arose out of the movements of a body of men known as the Vigilance Committee, in the city of San Francisco, during the excitement which existed in that city during the summer of 1856. The prisoner was charged with being concerned in making an assault upon a vessel on her way from Sacramento

to San Francisco, with arms on board, the property of the State, and carrying them off from those to whom the transportation of them had been confided by the authorities. The charge and instructions to the jury were delivered by—

McAllister, J.—Gentlemen of the Jury: We approach, we trust, the termination of this case with the single desire to dispense evenhanded justice between the parties. Each of you, placed upon that panel, has called upon his God to witness that he has neither bias nor prejudice in this case. As for myself, though it is my sworn duty to convict him whom the law condemns; yet to convict improperly under the forms of law would fill me with horror as great as if I were to take into my own hands the issues of life and death, and send down to the grave my fellow-creature without the forms, the guards, and the sanctions which the constitution, the laws, and humanity have thrown around him. Animated by this sentiment, I proceed to state to you the law which, in the opinion of this court, must control your action.

In order to fix your attention on the only issue you are sworn to try, it is necessary to separate it from all collateral considerations. The defense is rested upon the ground that, in seizing the arms for the taking of which the prisoner has been indicted, he was acting in obedience to the orders of a body which we charge you was unauthorized by and banded together in violation and defiance of the laws. It is our duty to say to you that no orders emanating from such a source can vary the character of the act charged against the prisoner, if it be established that he is guilty of it under the law and testimony in this case.

Again, Gentlemen, the prisoner may have been guilty of a crime or crimes other than that for which he is indicted; he may, in what he has done, have acted with those who deserve execration as unfeeling violators of the laws of their country, or merit approbation as patriotic citizens. In a word, he may have transgressed every precept of the moral or municipal law. Those, and all other like considerations, must be dismissed from your minds. He is on trial for a single offense,—piracy. Any other crime he may have committed; but if you shall find he is innocent of the one now charged against him, he must go free. This is demanded by an immutable principle of justice. No man can be held responsible for an act unless, after having been confronted with his accuser and an impartial trial had, he has been found guilty; and then his responsibility must be confined to the specific crime that has been proved against him. This is a right guaranteed even to a malefactor. It has been truly said by a distinguished author that, "the law withdraws its protection from a malefactor while actually engaged in illegal acts; but at any other moment, it protects his person and property as impartially as it does yours or mine. For instance, if a burglar breaks into my house, I may then and there cut him down like a dog. If a pickpocket puts his hand into my pocket, I may knock him down. But if I break into a notorious felon's house, and rob him, I am just as great a felon in the law's eye as if I so robbed an honest citizen; and so, if I attack a burglar's or a a pickpocket's person and life at any moment when he is not feloniously engaged, I am none the less a villain in the law's clear eye because my villainy is aimed at an habitual villain. And here the law is not only just but expedient; for were such fatal partialities admitted, we should soon advance from doing

acts of villainy upon villains to calling any one a villain whom we wished to wrong, and then wronging him." Thus vigilant and just is law; it views every man before judgment innocent, so far as affording him an opportunity to defend himself surrounded by those guards which the law has prescribed.

To deal differently with an accused party, would violate alike the precepts of municipal law and the dictates of natural justice. We repeat, then, your duty is to limit your attention to the single inquiry whether the prisoner is guilty or not of the specific crime for which he is indicted.

The indictment is founded upon the 3d section of the Act of May 15, 1820. (3 Statutes at Large, 600.) So much of it as is necessary to be considered is in the following words: "That if any persons shall upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of *robbery* in and upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate, and being thereof convicted before the Circuit Court of the United States for the district into which he shall be brought or in which he shall be found, shall suffer death." The power of congress thus to legislate, is derived from that clause in the constitution which declares, that the judicial power shall extend to "all cases of admiralty and maritime jurisdiction." Originally, the States had exclusive jurisdiction of all crimes committed within the limits of their respective counties. Then came the clause in the constitution referred to. In relation to this, the Supreme Court of the United States have said, "It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction is in the government of the Union. Congress may pass all laws which are necessary and

proper for giving the most complete effect to this power." (*United States* v. *Bevans*, 3 Wheaton, 388.)

The legislation of congress prior to the passing of the act under consideration, has been limited in its enactments to offenses committed on the high seas, and to places the exclusive jurisdiction over which had been ceded to the general government. Finding it necessary and proper, in order to carry out fully the power vested in them in all cases of admiralty and maritime jurisdiction, congress passed the act under which this indictment is framed; which, while it accomplishes the contemplated object, impinges no further upon the jurisdiction of the States than was absolutely necessary to achieve the object which, under the grant by the constitution, it was in their power to effect. The *proviso* to the act declares, "That nothing in this section contained shall be so construed as to deprive any particular State of its jurisdiction over such offenses when committed within the body of a county; or authorize the courts of the United States to try any such offenses after conviction or acquittance for the same offense in a state court." The jurisdiction of the federal and state judiciary is therefore concurrent in this case, and the familiar principle intervenes, that where there are concurrent jurisdictions the one who first obtains possession of the case must exert it.

In the exercise of this jurisdiction, the court has no unwritten criminal code to which it can resort as a source of jurisdiction; nor can it look to the common law, further than as a guide in its exercise of the jurisdiction conferred upon it expressly by statute. The legislative authority must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense, before cognizance

can be taken of it. (*United States* v. *Hudson*, 7 Cranch, 32.) The act on which this indictment is founded declares, *robbery* committed on the high seas and in certain places shall be deemed to be *piracy*. To become a pirate under this law, a man must have committed robbery. Of the meaning of the term "robbery," we think there can be no doubt. It must be understood as it was recognized and defined to be at common law. Although the common law is not a source of jurisdiction in the courts of the United States, it is necessarily referred to for the definition and application of terms.

The only inquiry, then, is, What was robbery at common law at the time of the separation of the American Colonies from the parent country? (*United States* v. *Palmer*, 3 Wheaton, 610). In robbery, which is larceny accompanied by intimidation or force, the *felonious intent* in taking constitutes the offense. Blackstone tells us, the taking and carrying away must be done *animo furandi*, or, as the civil law expresses it, *lucri causâ*. Lord Coke, in his "Institutes," and Hawkins, in his "Pleas of the Crown," gives the same definition. (1 Hawkins, 93.) Archbold states that "larceny, as far as respects the intent with which it is committed, is where a man knowingly takes and carries away the goods of another without any claim or pretense of right, with intent wholly to deprive the owner of them and to appropriate or convert them to his own use." In *Pear's Case* (East's P. C., tit. Larceny, § 2), Baron Eyre defines larceny to be "the wrongful taking of goods with intent to spoil the owner of them *causâ lucri*."

The foregoing authorities all include in larceny, as an essential element, what is termed the *lucri causa*. A similar view is taken by the Supreme Court of Missouri in the case of *The State of Missouri* v. *Conway* (18 Missouri, 321). "The taking [say the court] must be done *animo furandi*, or, as

lucri causa. The felonious intent is the material ingredient in the offense." To constitute this offense, therefore, in any form, there must be a taking from the possession, a carrying away against the will of the owner, and a felonious intent to convert it to the offender's use.

Again, in the State of Delaware it was ruled, that if the party indicted for larceny, where he took a horse for the stealing of which he was indicted, intended to appropriate him to his own use, by selling or retaining him to his own use, it was felony; but if he only took him to aid him in his escape as a runaway slave, it was no more than a trespass. (2 Harrington, 529.)

In Alabama, the Supreme Court considered the doctrine at common law to be "that the criminal intention constitutes the offense, and is the only criterion to distinguish a larceny from a trespass. That, according to the common-law writers, to constitute the offense of larceny it was not sufficient that the goods be taken for the purpose of destroying them to injure his neighbor, and actually destroying them. Such offense would be malicious mischief; but it would want one of the essential ingredients of larceny—the *lucri causa*—the intention to profit by the act by the conversion of the property." *State* v. *Hawkins* (8 Porter, 461). In that case, although it was evident the prisoner had secreted the slave from her owner with a view to do the owner an injury by aiding the slave to obtain her freedom, still, as there was no intention to convert the slave to his own use, the party was held to be not guilty of larceny.

The courts, then, of Missouri, of Delaware, and of Alabama, in the three cases cited, consider the doctrine of the common law to be, that to constitute larceny there must be, as an essential ingredient and a necessary element, the *animus*

furandi or *lucri causa*. There are decided cases in England which sustain a similar doctrine. Thus, in *Rex* v. *Holloway* (5 Carr. & Payne, 524), decided in 1833, the prisoner was indicted for stealing a gun from the prosecutor, who was a game-keeper. The latter, knowing him to be a poacher, seized him. A companion of the prisoner rescued him; and the latter, getting free, wrenched the gun from the prosecutor and ran off with it. It was proved that the prisoner said he would sell the gun, and it was not afterwards found. The jury returned that they did not think that the prisoner, at the time he took the gun, had any intention of appropriating it to his own use. "Then [said the court] you must acquit him. It is a question peculiarly for your consideration. If he did not, when he took it, intend its appropriation, it is not felony; and his resolving afterwards to dispose of it, will not make it such."

In *Rex* v. *Crump* (1 C. & P., 658), the prisoner was indicted for stealing a horse, three bridles, two saddles, and a bag; and the court left it to the jury to say whether the prisoner intended to steal the horse; for if he intended to steal the articles, and only to use the horse to convey the articles away, he would not be guilty of stealing the horse. The case of *Rex* v. *Wright*, was that of a servant indicted for stealing his master's plate; and it appeared that, after the plate was missed but before complaint was made, the prisoner replaced it. It was in proof that the plate had been pawned, and the pawnbroker testified that the prisoner had, on previous occasions, pawned plate and redeemed it. The court left it to the jury to say, whether the prisoner took the plate with intent to steal it, or to raise money on it and then return it; for in the latter case it was no larceny. The prisoner was acquitted.

In *Rex* v. *Van Muyen* (1 Russ. & Ry. 118) the prisoner,

who was master of a Prussian vessel captured by the British and carried into a home port, was indicted for stealing certain articles from the ship. There was no evidence to prove whether the prisoner had taken the articles for his own use or that of his owners. Chambers, J., reserved the point for the opinion of the judges; and a majority of them were of the opinion that if the prisoner had taken the articles for his own use, it was larceny, otherwise it was not.

In *Regina* v. *Godfrey* (8 C. & P., 563), it was decided, that where a person from curiosity, either personal or political, opens a letter addressed to another person, and keeps the letter (this in the absence of a statute), it is a trespass, not a larceny, even though a part of his object may be to prevent the letter from reaching its destination.

The foregoing decisions embody, in a practical form, the principle enunciated in the definitions given by the text-writers. We will now advert to three or four recent English decisions, which seem to qualify the doctrine. In the year 1815, two decisions were made in England, which were subsequently followed by two others, without comment or discussion. The first is that of *Rex* v. *Cabbage* (1 Russ. & Ry. 292). The principle enunciated was, "that if the intent be to destroy the article taken, it will be sufficient to constitute the offense of larceny, if done to serve the prisoner or any other person, though not in a pecuniary way." The case was this: The prisoner, to screen his accomplice, who was indicted for stealing a horse, broke into the prosecutor's stable and took away the horse, which he backed into a coal pit and killed. A majority of the judges decided this was larceny. At such a decision we are not surprised to find Lord Abingdon exclaiming, in 1838, when that case was cited in his presence, "I cannot accede to that!"

The second English case on this point, is *Rex* v. *Morfit*

(1 Russ. & Ry. 307), decided on the authority of the former. There, A and B, servants, opened the granary of their master by means of a false key, and took two bushels of beans to give to their master's horses, in addition to the quantity allowed; and it was held to be larceny. Some of the judges alleged that the additional quantity of beans would diminish the work of the men who had to look after the horses, and this diminution in their labor was considered a *lucri causa*. The astuteness with which the *lucri causa* was sought for and discovered in that case, is strong proof of the stringency of the rule which requires it as an essential ingredient in the crime of larceny. This case is referred to by a recent writer as a "singular case on this point." (Archbold's Criminal Law, edition 1853.) Such it undoubtedly is; as in effect it destroyed the distinction which had existed from an ancient period between larceny and trespass, unless we can, with some of the judges, detect the existence of the *lucri causa* in that case. Looking into the cases last cited, and the grounds on which they were decided, we deem the observations made in relation to them by the Supreme Court of Alabama, not inappropriate. "It appears to us [they say], that these cases cannot be considered authority in this country. The shadowy and almost imaginary distinctions upon which they rest, are at war with that precision and certainty which are the boast of the criminal law of England." (8 Porter, 465.)

These cases stand in direct opposition to the numerous authorities, English and American, above cited. They introduced a change into the common law as it existed at the time of the emigration of our ancestors to this country; and we cannot recognize modifications recently made in the common law of England, as controlling this court. If an authority could have been found emanating from an American court, adopting

these hair-breadth distinctions, it certainly could not have eluded the search of the profession.

After a careful examination of the law, we give you, Gentlemen, the instructions which follow:

1. That if you believe, from the evidence, that the prisoner took and carried away the arms, with the intent to appropriate them, or any portion of them, to his own use, or permanently deprive the owner of the same, then he is guilty.
2. But if you shall believe that he did not take the arms for the purpose of appropriating them, or any part thereof, to his own use, and only for the purpose of preventing their being used on himself or his associates, then the prisoner is not guilty.

Verdict, "Not Guilty."

William Blanding, U. S. District Attorney, for prosecution.

I. B. Crockett and Wm. Duer, for defendant.

BROWNELL *v.* GORDON.

Circuit Court, U. S., July Term, 1856.

THE right of transfer of a case from a State court to a Circuit Court of the United States, awarded to an alien by the 12th section of the judiciary act of 1789, is one of which he cannot be deprived, if he has complied with its provisions.

It is not indispensable that the averment of the citizenship or alienage of a defendant should appear on any one of the papers transmitted with the order of the State court, for the transfer of the case to this court.

A motion is made to dismiss this case on the ground that there are no averments in the pleadings, which show jurisdiction of either subject-matter or the parties.

The case had been transferred to this court from the District Court of the 11th judicial district of this State, under the 12th section of the judiciary act of September 24, 1789.

MCALLISTER, J.—The privilege conferred by the section of the law under which this case was removed to this court, is one to which a defendant is entitled who brings himself within its terms, and of which the court cannot divest him. (Conkling's Treatise, 173.) The inquiry is, has this defendant so far complied with the terms of the law as to entitle himself to the exercise of this right? It is clear, that if anything appeared affirmatively on the papers sent to this court, to show that the defendant had not availed himself of his right at the time, or given security as prescribed by the statute, or that the court had not transferred the case to this tribunal, it would have

been the duty of this court to have remanded it to the State tribunal. The amount on the face of the summons exceeds the sum of five hundred dollars; and the only question is, whether the averments of citizenship must necessarily be made on some one of the papers transmitted to this court in order to enable it to enter the case upon its calendar; for that is all the court has to do before proceeding in the case. It certainly would have been a more regular practice if the order of the State court, or the petition for the removal, had enumerated the grounds and facts upon which the petition was based, and on which the action of the court was taken; but this is not required by the act of congress. Conkling, in his treatise, says, "The order (of removal) to be entered is, that the security afforded be accepted; that the cause be removed to the Circuit Court of the United States, in and for the district of ————, and if bail has been put in, that the bail of defendant be discharged." . . . "Such order being entered, all further proceedings are suspended until the next session of the court to which the removal is directed to be made; at which time *a certified copy of the order of removal* and of the *process* by which defendant was brought into the State court, must be produced in the national court; upon the reading and filing *whereof* it will be ordered by that court that the case be entered therein." (Conkling, 482.)

There has been a strict and literal compliance with these directions in this case. A certified copy of the process has been produced, together with the order of the State court for a removal, which states that a bond had been filed, that counsel for both parties had been heard, and concluding with an order that all further proceedings should be stayed, and the removal of the cause into this court be had; and that the clerk do furnish defendant or his counsel with certified copies of the sum-

mons (process) and of this order. The order in this case states more than is deemed to be necessary; but, having stated all that is necessary, and the defendant having produced certified copies of the process and complaint, it is the duty of this court to enter the case upon its docket. It is evident that the State court coincided with the text-writer cited, in the opinion that those documents were sufficient to authorize this court to order an entry of it on its calendar.

We will now look to the phraseology of the law under which this proceeding has been taken. The twelfth section of the judiciary act of 1789 (1 Statutes at Large, 79), enacts that if a suit be commenced in a State court against an alien, and the matter in dispute exceeds $500, exclusive of costs, to be made to appear to the satisfaction of the court, and the defendant shall, at the time of entering his appearance in such State court, file a petition for the removal of the cause for trial into the next Circuit Court, &c., and offer good and sufficient security for his entering in such court on the first day of its next session copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall be then the duty of the State court to accept the security and proceed no further in the cause, and any bail originally taken shall be discharged; and the *said copies*, being entered as aforesaid, the cause shall proceed in the same manner as if it had been brought there by original process.

Now, it is evident, this act did not contemplate any averment of citizenship as necessary to be made in any paper transmitted to this court from the State tribunal, for it required none other than a certified copy of the *process*. From the character of that document, as it existed in 1789, when that act was passed, it will be found that the averment of citizen-

ship was never found in it. At that time, the common-law system prevailed throughout the States. The mode of compelling the appearance of a defendant was by *capias*. The appearance of defendant to non-bailable process, or *capias*, was by indorsement on the writ of an engagement to appear on the return-day; or, in default of so doing, the sheriff returned service of the writ, and the appearance of defendant was entered. After his appearance, the plaintiff filed his declaration. Such was the proceeding at the time of passing the act of congress which required the defendant at the time of entering his appearance in the State court, to take the steps therein prescribed to remove the cause. Now, at this period of time, the process was a simple *capias;* nor would it contain an averment of citizenship any more than our summons (the substitute for the *capias*) does at the present day. Being a process from a State court, no averment of citizenship was necessary or ever made. Even when process is issued from this court, no such averment is made in it. That is not made until the declaration is filed. The pleadings then only commence in which the averments to give jurisdiction are necessarily made.

Whether we look to the nature and form of the process, and the fact that it was the only document of which, with evidence of the removal, copies were required to be produced, or to the phraseology of the statute, it seems evident that an averment of citizenship in some one of the papers transmitted by the State court, is not indispensable. *Cui bono* should it be required? After the removal, not one step could be taken without amending the pleadings, so as to insert the necessary averments as to citizenship.

In this case, the party has complied with the terms of the statute, and is entitled to have his case entered on the calendar. When that is done, it is the duty of this court to proceed in

the same manner as if the case had been originally brought here. If originally brought here, the plaintiff would have been obliged to have filed his complaint (declaration) with proper averments as to jurisdiction. It is his duty to do so now. There is also a precedent for this course. In *Clarke* v. *Protection Insurance Co.*, referred to in 1 Blatchford's C. C. Reports, 150, it is decided, that on the transmission of the process or declaration by which the suit was commenced in the State court and the entry of the same in the Circuit Court, the plaintiff must file a new declaration in accordance with the practice of the Circuit Court, the same as if the suit had been commenced by regular process in the latter court. Until the filing of such new declaration, the plaintiff cannot enter a rule to compel the defendant to plead, nor enter his default for not pleading. The nature and character of such new declaration or complaint is optional with the plaintiff, provided it sets forth substantially the same cause of action with that set forth in the process, or summons, which issued from the State court.

The motion to dismiss is denied; and the case is hereby ordered to be entered on the calendar of this court, leaving to plaintiff his right to prosecute his suit by filing a new declaration, or amending the old one by insertion of proper allegations as to citizenship.

Meredith & Hewes for plaintiff.
Janes, Doyle, Barber & Boyd, for defendant.

GRIFFING *v.* GIBB AND FRAZER.

U. S. Circuit Court, August Term, 1857.

A LEGISLATIVE grant is equivalent to a patent; and one made to a class of persons is as valid as one made to an individual.

The sovereign or supreme legislative power may confirm an act originally void; an individual cannot.

Grants from the sovereign to individuals are to be strictly construed.

Such rule is applied stringently to a grant made to individuals for franchises.

Such application should not be made to a purchaser under a legislative grant.

It should be interpreted according to the ordinary meaning of its language.

This court cannot declare an act of the State legislature void because it conflicts with the Fifth Amendment of the Constitution of the United States.

The State law must conflict with some provision of the Constitution, impair the obligation of a contract, be an *ex post facto law*, or come in collision with some act of congress passed in pursuance of the Constitution of the United States.

A *nuisance* existing under a local law, if it amounts not to a national one, will not be enjoined by this court.

A settled construction fixed by the highest judicial tribunal in a State upon one of its statutes, will control the decision of this court, where there is no conflict between it and the Constitution of the United States.

Each State in the Union has a right to the soil under navigable water within her territorial limits.

This right is subservient only to the surrender she has made to the general government, in the Constitution, of the right to regulate commerce with foreign nations, and among the several States.

This bill was filed to obtain an injunction.

The facts will be gathered from the allegations of the bill and the statements in the affidavits which have been filed. The former alleges, that complainant is the owner of certain

lots in the city of San Francisco, described in the bill; that he is in the exclusive possession of the same, and has erected improvements thereon to the amount of $200,000; that said lots originally fronted on and formed a part of the natural shores of the bay of San Francisco, with a deep acclivity in the rear and a bold water-front where the tide regularly ebbed and flowed and still flows, and where ships of the largest class, sailing to and from the ocean, might approach in safety and receive and discharge cargo; that in 1850 complainant commenced improvements by excavating the hill for his present warehouses; at the same time preparing a suitable wharf in front for receiving and discharging cargoes of ships; that he purchased said property with the view of acquiring the uninterrupted use and enjoyment of said water-front, which is navigable for the largest vessels; that since the erection of his warehouses on said property in 1851, he has been in the enjoyment of said water-front and receiving thereat, in navigable tide-waters, cargoes from the largest vessels; that when he commenced his improvements there was no sign or appearance of either Battery or Filbert streets at or near the premises, but the lines of said streets were only definable on some of the maps of the city of San Francisco; that defendants are engaged in driving piles in the ground under the navigable waters of the bay of San Francisco in front of plaintiff's premises, and declare their determination to construct a wharf covering one hundred varas square, forming the northeast corner of Filbert and Battery streets, as the same are defined on the maps of the city of San Francisco,—being a lot of land 275 feet square covered by the navigable waters aforesaid, where at low tide vessels of the largest class are in the habit of passing and repassing, sailing to and from the ocean in pursuit of commerce, and especially to approach the

wharves in front of the property of the complainant; that such acts of filling and wharfing by defendants are wrongful and unlawful, and contrary to the constitution and laws of the United States; that if continued and completed, as projected by defendants, they will entirely obstruct and cut off complainant from the use of the present water-front, and cut off the access of vessels to it; that the effect of piling by the defendants will be to check the current at that point, and fill up that part of the bay above and below complainant's premises with sediment, so as to render the same unnavigable; that the works of defendants will, if permitted to be continued, greatly obstruct the navigation of that part of the bay, and will especially do irreparable injury to complainant's. The bill concludes with a prayer for an injunction, damages, and general relief.

A motion is made upon this bill for an injunction.

This has been met by numerous affidavits. It is denied that the lots claimed by complainant originally fronted on, and formed part o fthe natural shore of the bay; and it is distinctly averred, that complainant himself has built upon a considerable extent of the water-front beyond low-water mark.

The defendants set forth that complainant purchased two of the lots, numbers 1846 and 1847, on the 8th of March, 1851; that the act of the legislature of the State of California, commonly known as the "Beach and Water Lot Bill," was passed on the 26th March, 1851, and that previous to its passing complainant had made no considerable improvements on said lots; that in front of these lots, numbered as above, are premises owned by one John Crowell, and that on a portion of the same and in front of said lots 1846 and 1847, viz., between the easterly line of Battery and the westerly line of Front street, there now exists and has existed for the last four years a wharf

of some 275 feet in length, from east to west, running to or near the westerly line of Front street, known as Crowell's wharf; that in relation to two of the four fifty-vara lots that lie north of Filbert street, they were purchased by complainant on the 29th March, 1851, and that no improvements of any kind were made on the same until the passing of the said Beach and Water Lot Bill; that at the time the complainant made his first purchase, on the 8th day of March, 1851, it was notoriously known that the only title which could be acquired to beach and water property in this city was by a grant from this State, and that at the time of the said purchase, the contemplated provisions and intent of the act which passed on the 26th March, 1851, were matters of notoriety.

It is denied, that plaintiff's warehouses have ever been situated on the water-front of the bay; and it is affirmed, that at the time of the construction of the first house by complainant, it was well known to the public and to complainant that Battery street, a public street of said city, would run in front and to the eastward of said four lots of complainant; and at the time he made his first purchase of any of said four lots, said Battery street was distinctly laid out and defined on the official map of San Francisco; and that complainant holds title to two of the four fifty-vara lots which lie to the south of Filbert street under an alcalde's grant dated 13th June, 1847, to one William Hood,and the property conveyed therein, is described as a hundred-vara lot, bounded north by Filbert street, east by Battery street or place, south by Union street, and west by Sansome street, which grant was duly recorded. That on the 8th March, 1851, William Hood conveyed to complainant the northern half of said lots (1846 and 1847), and the property was described as "beginning at the southeast corner of Sansome and Filbert streets, running thence easterly one hundred varas

along the southern line of Filbert street to the corner of Battery street, thence southerly along the westerly line of Battery fifty varas to a point equally distant from Filbert street and Union street, thence westerly one hundred varas to the easterly line of Sansome street at a point equidistant from Union and Filbert streets, thence north to the place of beginning, being the northern moiety of the hundred-vara lot bounded by Filbert, Battery, Union, and Sansome streets."

It is also proved that the deed, from Hood to complainant, has been duly recorded. The affidavit proceeds to trace the title of complainant to the remaining lots, with a view to show that the deeds under which he holds describe the property like those above, as bounded by the same streets.

It is denied by defendants that complainant has any riparian rights. It is admitted that defendants claim title to the 100 varas which they are about to improve; that they derive title under an alcalde grant, under date of 26th June, 1848, which grant was duly confirmed according to the provisions of the act of the legislature of this State, 26th March, 1851. That record of said grant was made on the 26th June, 1848, and again on the 28th November, 1849; that by virtue of said record and grant, and by virtue of the confirmation and re-grant of same by the said legislature, defendants are owners of said premises. That under another act of the legislature of this State, passed 15th May, 1853, entitled, "An Act to provide for the sale of the interest of the State of California in the property within the water-line front of the city of San Francisco, &c.," —the defendant, Daniel Gibb, became the purchaser of said property, and has since conveyed a moiety of same to his co-defendant, Frazer.

The defendants admit their determination to improve their lot; but deny explicitly that the completion of their work will

in any way obstruct the free navigation of the harbor, but will prove a decided benefit to it.

Numerous affidavits from both sides have been filed; and upon bill and affidavits, a motion is made for an injunction.

The following decision was delivered by—

McAllister, J.—The title of defendants in this case rests upon a legislative grant from this State. The grounds on which complainant assails that title, are:

1st. That the acts of the legislature relied on did not pass to the grantee such interest in the land as would authorize the defendants, who have become subrogated to that title, to make the improvements they propose.

2d. If they have that effect, they are unconstitutional and void.

We will consider them in their order.

A direct conveyance by legislative grant is equivalent to a patent (*Lessee of Grignon* v. *Astor*, 2 Howard, 319); and a conveyance by statute to classes of persons, is as legal as those made to specified individuals. (*Guitard* v. *Stoddard*, 16 Howard, 494.) The inquiry *in limine* is, Did the acts of the legislature on which defendants rely, convey such interest as authorizes the making improvements on the lots?

The act of the legislature of this State, of 26th March, 1851 (Comp. Laws, 764), professes in its title to "*dispose*" of the property of the State. The first section gives the boundaries of certain land, within the limits of which the lot claimed by defendants is situated. In the second section, the use and occupation of the land previously described, and which had been sold or granted by any alcalde and confirmed by the

ayuntamiento, and recorded in the manner and at the time prescribed, was granted for the term of ninety-nine years.

The defendants hold under a grant from an alcalde, confirmed by the *ayuntamiento*, and recorded in conformity with the terms prescribed by the act of the legislature. They, therefore, come literally within the class of grantees to whom the use and occupation of the lands was intended to be granted. The third section of the act declares that the original written instrument of conveyance, or in case of its loss a record thereof, may be read in evidence in any court of justice in this State, upon the trial of any cause in which the contents of the same may be important to be proved, and shall be *prima facie* evidence of title and possession to enable the plaintiff to recover the land so granted. The fourth section of the act, declares that the boundary line described in section first, shall be and remain a permanent water front of said city; the authorities of which shall keep clear and free from all obstructions whatsoever, the space beyond said line, to the distance of five hundred feet therefrom.

Now, if the alcalde grant be admitted *ex gratia* to be void, although a private individual cannot confirm that which was void, the sovereign or the legislature may. In this case, the legislature have not only granted the use and occupation of the land, but have made certain documentary title, now in the possession of defendants and produced by them, evidence of title and possession. I cannot doubt the meaning and effect of this statute.

It has been strongly urged that nothing is to be considered as passing by implication in a public grant, but it is to be strictly construed. Such is the proper construction made of a grant by the King at the suit of his subject. Such construction has been applied in its full extent by the courts of this country,

to acts of the legislature granting privileges to private corporations, franchises and monopolies to individuals; but it may be well questioned, whether the rule is to be strictly applied to a purchaser under an act of the legislature. In such case, the act and every part of it, should be construed according to the ordinary and grammatical sense of its language. But it is not necessary to discuss this question; as the terms of the act under consideration clearly conveys by grant, the use and occupation of the land. That it was intended to permit structures and improvements on the land, within the water-front which had been granted, is evident from the provision introduced into the law,—that the authorities should keep clear all obstructions outside of that line.

The last section of this act, provides that nothing therein contained shall be construed as a surrender by the State of its right to regulate improvements, so that they shall not interfere with the shipping and commercial interests of the bay of San Francisco. We consider this a mere reservation of the right of navigation police, by which the State very properly reserved to itself the protection of the shipping interests.

The very fact that it reserved to itself the right to regulate the improvements, shows that such were contemplated to be made, and therefore such power was reserved to enable the State to interpose in case the structures made would injure the harbor.

The next act of the legislature on this subject, is that passed on 18th May, 1853 (Pam. Laws, 1853, p. 219.) This refers to the previous act, of 26th March, 1851, and the water-front adopted by it. This act makes provision for the sale of the interest of the State in the property included in the boundaries described in the first section of the preceding act. In its 8th section it enacts that upon a sale made by the commissioners

to whom by the act the sale is confided, so soon as the purchaser shall comply with the terms of sale, a deed shall be made to him, which shall be *prima facie* evidence of the regularity of the preliminary proceeding and sale, and the title and right of possession in the grantee his heirs and assigns, upon which actions for the recovery of real property, or for injuries thereto, may be sustained and defended in all the courts of this State.

It will be unnecessary further to discuss the question as to the quantity of interest which passed under the acts of the legislature we have had under consideration; as that question has been adjudicated on by the highest judicial tribunal in this State, to which we shall hereafter refer.

2d. The second ground taken for the complainant is, that if these acts of the legislature do pass a title to the land as alleged by defendants, they are unconstitutional and void.

It is urged in argument, that the legislature of this State in the enactment of these laws have legislated retro-actively, have divested vested rights, have devoted property that should have been held sacred to public use, to private purposes; that the obstruction, if completed, will amount to a nuisance within the meaning of the definitions given to it by law. With the vindication of this law from the foregoing objections, this court has nothing to do. That must be left to the decision of the Supreme Court of this State. So far as this court is concerned, all the foregoing objections to these acts of the legislature may be valid; still, if neither shall be found to conflict with the constitution of the United States, or some act of congress passed in pursuance thereof, they cannot authorize it to declare those laws unconstitutional and void. Thus, if the legislature of a State were to take by its action private property for public use, without just compensation, this court could not declare it void; because the 5th amendment of the constitution of the United

States, which inhibits the so doing, is only a limitation on the powers of the United States, and not applicable to the legislatures of the States. (*Barron* v. *The City of Baltimore*, 7 Peters, 243.)

In the case of the *Baltimore and Susquehanna Co.* v. *Nesbit* (10 Howard, 395), the Supreme Court say, That there exists in the State legislatures a power to enact retrospective laws, "is a point too well settled to admit of question at this day. The only limit upon this power in the States by the federal constitution, and therefore the only source of cognizance or control with respect to that power existing in this court, is the provision that these retrospective laws shall not be such as are technically *ex post facto*, or such as impair the obligation of contracts."

In the case of *Carpenter* v. *The State of Pennsylvania* (17 Howard, 456, 462), it is said, "This court has no authority to revise the act of Pennsylvania upon any grounds of justice, policy, or consistency to its own constitution. These are concluded by the decision of the public authorities of the State. The only inquiry for this court is, does the act violate the constitution of the United States, or the treaties and laws made under it?"

It is next urged, that the mischief complained of constitutes a nuisance within the meaning given by the definition annexed to that term by law. It may be admitted that the obstruction in this case may (although existing by an act of the legislature) be considered a nuisance, in view of the common-law definition of the term; yet it surely cannot be successfully contended, that it is within the power of this court to abate what the legislature has willed to exist, on the ground that it is a nuisance at common-law! Arguments and authorities adduced in relation to mere local nuisances, and as to the alleged

injustice and inconsistency of these acts of the legislature of this State, are to be discarded by this court; and the question confined to the single inquiry, "Does either of these acts conflict with any provision of the constitution of the United States, or any act of congress passed under it?" Another reason precludes inquiry into them. They, as well as the interest they convey, have been adjudicated on by the constituted authorities of this State. How far is this court concluded by the construction placed by the highest judicial tribunal of this State upon one of its local statutes? In *Woolsey* v. *Dodge* (6 McLean, 150), the learned judge says, "This court brings into a State no novel principles. . . . It administers the law of the State. In giving effect to the statutes of a State, where there is no conflict with the federal constitution, the courts of the Union follow implicitly the rule established by the Supreme Court of the State." So far has this been carried, that the Supreme Court of the United States has reversed its own decision in order to conform to a change of the Supreme Court of a State in the construction of its statutes. In *McKeen* v. *Delancy's Lessee* (5 Cranch, 22), the principle enunciated is, that, in construing the statutes of a State, the Supreme Court will adopt the construction settled in the State courts, though not in accordance with its opinion. In *Elmendorf* v. *Taylor* (10 Wheaton, 157), it is affirmed, that if the construction of a State statute is settled by the highest court of a State, this court adopts the construction. "If (said C. J. Marshall) this question has been settled in Kentucky, we must suppose it to be rightly settled." Such is the unbroken authority on this point. To pursue it further is unnecessary.

We now turn to the exposition given by the constituted authorities of this State to the acts of the legislature before cited.

In the case of *Eldridge* v. *Cowell* (4 Cal., 80), a bill was filed for the very purpose sought in the present. In that, as in this, the defendant relied upon the same legislative acts as the warrant for his structures. Under the instruction of the court, a verdict was rendered against the plaintiff. The case was carried to the Supreme Court. In adjudicating the case, that tribunal enunciated the following propositions:

1st. That the extension of the water-front of the city, as laid down by the survey, and in the plan of the city of San Francisco, was perfectly legitimate in the establishment of a seaport town.

2d. That the right of the owners of water-lots, to fill them in with earth for the purpose of improvement and use, was practically admitted by plaintiff, by filling in part of his own lot, and the street in front of it, which was in the water.

3d. That it was sufficient that, by the act of 26th March, 1851, the plan of the city was recognized by the State, and property covered by tide-water vested in individuals.

In another case, that of *Cook* v. *Bonnet* (4 Cal. 397), that court again recognized the validity of the act of 26th March, 1851. By a uniform rule, we have seen it is the duty of this court to conform to the construction placed by the highest State court on the statutes of her State. This will render it unnecessary to discuss many questions which have been raised in this case; and we will confine ourselves to the question we are to decide, Are these acts of the legislature of this State in conflict with the constitution of the United States, or any act of congress passed in pursuance thereof? The first inquiry is, as to the right of California to pass these laws; and this involves her right to the soil under navigable waters within her territorial limits.

The second inquiry is, to what extent is such right diminished by her membership in the Federal Union?

When the Revolution was consummated, the people of each State became sovereign, and in that character had the absolute right to all navigable waters and the soil under them in their then limits, and still hold that right subject to any surrender of it by the constitution to the United States. (*Martin* v. *Waddell*, 16 Peters, 411.)

When California was admitted into the Union she became entitled to the same right, being admitted on an equal footing with the original States. (*Pollard's Lessee* v. *Hagan*, 3 Howard, 212, 229.)

The right of eminent domain over the shores and soil under navigable waters, for all municipal purposes belongs exclusively to the States within their respective territorial limits, and they only have the power to exercise it. This right of eminent domain consists of the right of the sovereign to dispose of all the wealth contained in the State. (Ibid. 223, 230.) Such is the right of California to the soil under the waters of the bay; and it is only qualified by the prerogatives she has surrendered to the United States when she came into the Union. One of those prerogatives was the right to regulate commerce. Any exercise of her right of eminent domain which does not conflict with a regulation of commerce is legitimate.

This statement would seem to show that a partial, local, or slight obstruction which operates only on some specific spot,—for instance, the construction of a wharf, the establishment of a water-front to a city, and the like,—cannot *per se* constitute such a national nuisance as would conflict with the power of congress to regulate commerce, or empower this court to abate it.

The State must grossly abuse her right by an essential and material obstruction of a communication, which it is the right as well as the duty of the government of the United States to keep open as a high road to the commerce of the citizens of the United States and of the world. There may be many obstructions which a State may authorize, nay, many which by local laws would be nuisances; still, if they are not in nature essential and serious, so far as this court is concerned they must remain so long as the authorities of the State, legislative and judicial, decree their existence.

Let us see to what extent the power invoked in this case has been exerted by the federal judiciary.

In the *State of Pennsylvania* v. *Wheeling and Belmont Bridge Co.* (9 Howard, 647), it has been carried to a greater extent than in any case I have seen. A bill was filed to enjoin persons from the construction of a bridge across the channel of the Ohio. Before the argument of the cause, the work was completed and spanned the whole channel between Zanesville and the main Virginia shore, a distance of 1,000 feet. The cause was referred to a commissioner with power to take proofs and report whether the bridge was an obstruction, and if so, what change in the structure might be made, if any could be, consistent with the continuance of the same, that will remove *the obstruction to the free navigation.* Upon the report of the commissioner, finding among other things it was an obstruction, the court decided, that if the navigation could be restored by a draw, so as to render it in the opinion of the court free from *unreasonable* obstruction, the bridge should not be treated as a nuisance. By their final decree they directed an elevation of the bridge to the height of eleven feet above low-water mark by the Wheeling guage of the Ohio river, such elevation to be maintained the distance of three hundred

and eleven feet on a level headway over the channel of the river. Thus the bridge was permitted to span in its former dimensions over two thirds of the river's channel. If the existence of an *obstruction* across a navigable stream ceases by diminishing it one third, it shows that obstructions created by a State are not to be treated by this court as common nuisances. The United States and the State government both have rights, which in such cases the court is bound to protect.

In *Spooner* v *McConnel* (1 McLean, 337, 353), the court say, "We, therefore, can entertain no doubt that the legislature may improve at their discretion the navigable rivers of the State, and authorize the construction of any works on them which shall not *materially* obstruct their navigableness."

We come now to the character of the obstruction.

The act of congress approved 9th September, 1850, under which California was admitted into the Union, declares "that all the navigable waters within the State shall be common highways, and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor." This provision may be considered to extend to keeping the navigation free from material obstructions; and if such be the case, then if in this case the obstruction complained of were of a character to obstruct the free navigation of the waters of the bay, it would be the duty of this court to interpose. Can it be that the structure of a wharf on the front line of a city can be of such character? Such does not seem the opinion of the pilots of this port. The affidavits of seventeen of them have been filed in this case. They all swear they are duly licensed as pilots, and unite in deposing that in their opinion the contemplated structure of defendants, if completed, would in no way impede or injure the free navigation of any part of the bay now navigable, but

would be an advantage to the harbor of San Francisco, by affording wharfage to many vessels that cannot now approach the wharves in that part of the bay. This body of testimony is sustained by the depositions of several others, among them George Simpton, formerly a pilot and subsequently harbor-master of this port. Opposed to this testimony there are numerous depositions filed as counter-proof. Several of these limit the apprehended danger to the immediate locality.

But looking at the construction itself, we cannot consider it an unreasonable one, amounting to that national nuisance of which this court, in a controversy arising out of the action of a State towards its citizens, can take cognizance.

The width of the bay opposite to the spot where the contemplated wharf is to be built, is believed to be seven miles; the width of the ship channel opposite the same spot, a fraction less than two miles; and the distance intermediate the spot where the wharf is to be built and the usual track of vessels entering into and departing from the harbor, as given by the pilots, is five hundred feet. This spot is part of the soil below low-water mark, the property of the State, granted by her to those under whom defendants claim.

There is nothing in this case which would authorize this court to declare the structure of a wharf at that locality to be a nuisance, on the ground that it impeded the free navigation of the bay. The bill does not so treat it. There is a general allegation that the work is wrongful and if continued and completed will obstruct and cut off this plaintiff from the use and enjoyment of his riparian rights, and entirely destroy his present water-front. The only additional allegation in the bill on this point is, "that if said work be permitted to progress, the same will greatly impede the free navigation *of that part*

of the bay now navigable, and great wrong will accrue to the public, especially to the plaintiff."

There is no allegation in this bill of any obstruction which will impede or threatens to impede the harbor or bay, as a common highway.

The bill is predicated upon the idea that an obstruction to any extent of a portion of navigable water by the construction of a wharf in pursuance of a system of improvement laid down by the State in establishing a water-front to her port of entry, can in itself constitute a nuisance which this court may enjoin.

Upon a careful examination of this case we consider that the motion for an injunction must be denied; and it is ordered accordingly.

Holloday, Cary, & P. W. Shepperd, for complainant.
Hall McAllister, for defendants.

TURNER *v.* ALDRIDGE *et al.*

Circuit Court, U. S., August Term, 1857.

The general rule is, that a plaintiff in ejectment must recover upon the strength of his title; not upon the weakness of defendant's.

This is not an universal rule, and must be qualified by the case to which it is to be applied.

Where a plaintiff has documentary title, aided and accompanied by possession, and the defendant is a mere trespasser, the rule is qualified in its application. Against such defendant the plaintiff, under the decisions of the highest court in this State, is entitled to recover on prior peaceable possession alone.

This is an action of ejectment, brought for the recovery of eighty-three acres of land, formerly a portion of the ancient rancho of San Antonio. The title of the plaintiff is derived under *mesne* conveyances, from a grant issued by Governor Sala, in 1822, to one Luis Peralta. Upon this documentary title the plaintiff relies, together with possession from that time by those claiming under the grant until within some two or three years, when the defendants entered upon the premises sued for. No evidence was given by the defendants of title, nor to any other point. The charge to the jury was delivered by—

McAllister, J.—The defendants in this case give no evidence of title, and rest their defense exclusively upon the invalidity of the title of the plaintiff, and their possession of the land. No title can be derived from their possession, as it was tortious. The land in controversy was either "vacant," or land claimed "under a foreign title." If vacant, it was land

ceded to the United States by Mexico, by the Treaty of Guadalupe Hidalgo. Thus viewed, it was protected from the entry of defendants by the act of congress approved March 3, 1807, entitled, "An Act to prevent settlements being made on lands ceded to the United States, until authorized by law," which inhibits the entry upon, taking possession of, or settlement on any lands ceded or secured to the United States by any foreign nation, which have not been previously recognized to the person entering, &c., by the United States. (2 Statutes at Large, 445.)

If the land in controversy was not vacant, but claimed by plaintiff, and according to the testimony offered by defendants, claimed also by one Juan Jose, and one Victor Castro, both under Mexican titles, the entry upon it by the defendants could confer on them no rights, because, being land claimed under a foreign grant or title, it comes within the operation of another act of congress, approved March 3, 1853, entitled, "An Act to provide for the survey of public lands in California, the granting of pre-exemption rights, and for other purposes." This act expressly exempts the premises sued for from all pre-emption rights, it being land claimed under a foreign grant or title. (10 Statutes at Large, 246.) The defendants, therefore, allege no title; but having entered into possession of the premises in violation of law, are to be deemed trespassers and tort feasors; and the question arises, whether parties standing in that attitude can invoke successfully for their protection the rule of law relied on by their counsel in this case. That rule is, that a plaintiff in ejectment must rely on the strength of his own title, and not on the weakness of his adversary's. This is undoubtedly the general and well-settled rule; but it is not of universal application, and must be limited and qualified by the case in which it arises. (*Love* v. *Simms's Lessee*, 9 Wheaton, 515, 524.)

This rule is to be limited and qualified in this case, if you shall find from the evidence that possession has accompanied the documentary title of the plaintiff. In *Swift* v. *Tyson* (16 Peters, 1), the doctrine is enunciated that the decisions of the highest judicial tribunals of a State as to rights and titles having a permanent locality,—such as rights and titles to real estate and other matters immovable and interritorial in their character,—have been adopted as rules of decision in the federal courts by the 34th section of the judiciary act of 1789.

In *Beauregard* v. *The City of New Orleans* (18 Howard, 497), the court say, "The constitution of this court requires it to follow the laws of the several States as rules of decision, wherever they properly apply; and the habit of the court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the State, especially when applied to the title of lands. No other course could be adopted with any regard to propriety. Upon cases like the present, the relation of the courts of the United States to a State, is the same as that of its own tribunals. They administer the laws of the State; and to fulfill that duty, they must find them as they exist in the habits of the people and the exposition of their constituted authorities."

To the exposition given by the Supreme Court of this State, the court will now advert. In the first year of our political existence as a State, we find the case of *Ladd* v. *Stevenson* (1 Cal. 18). In that case, one who had been turned out of possession under the order of an officer who had no jurisdiction, was held entitled to recover on his prior peaceable possession. In *Brown* v. *O'Connor* (1 Cal. 421), the court say, "However defective then the title of the plaintiff may be, there was testimony tending to show that he was in prior peaceable possession of the premises; and it is to be presumed that

the jury found that the plaintiff had the prior and best right to the possession." In that case the plaintiff relied on what was considered defective documentary title in addition to his possession. In *Hutchinson* v. *Perley* (4 Cal. 33), the court said, "possession is always *prima-facie* evidence of title; and proof of prior possession is enough to maintain ejectment against a mere naked trespasser." In *Hicks* v. *Davis* (4 Cal. 67), the court said, "The action is for the recovery of land upon a claim of title based upon uninterrupted prior possession for several (three) years. We have always determined that possession is *prima facie* evidence of title, and this principle is firmly fixed in all common-law jurisprudence. That its efficacy has been impaired by modifications and conditions by some judges in other countries, is clearly manifested by the decisions. But unlike these, I see no reason to depart from the strictest simplicity and directness in the application of the rule."

In *Winans* v. *Christy* (4 Cal. 70), the court say, This was not a case of mere "possession, but possession coupled with color of title, which must prevail except where a better title is shown in the defendants." "Neither are the plaintiffs, although they alleged in their declaration a fee-simple title, compelled to prove the same. They could properly rely upon prior possession if they choose to do so."

In *Bequette* v. *Caulfield* (4 Cal. 278), the court say, "Possession gives a right of action against a mere trespasser, even where title may be shown to exist in another."

The doctrine sustained by this unbroken current of authority in this State, is maintained by the State tribunals in Connecticut, Vermont, Ohio, Kentucky, Virginia, and Tennessee, and by a recent decision of the Supreme Court of New York. It has received the approval of the Supreme Court of the United States. In *Christy* v. *Scott* (14 Howard, 282), Mr. Jus-

tice Curtis, delivering the opinion of the court, uses the following language: "But a mere intruder cannot enter upon a person actually seized, eject him, and then question his title, or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser, who entered without any title." He may do so by a writ of entry, where that remedy is practiced, or by an ejectment, or he may maintain trespass.

I have, Gentlemen of the Jury, contrary to my usual custom, cited authorities to sustain the conclusion to which I have come, and shall embody in an instruction to you. This has been done, because it has been urged with great earnestness by counsel in this case, that the general rule which requires a plaintiff in ejectment to recover upon the strength of his own title, enables a mere trespasser to maintain his possession if he can discover defects in any of the links of the chain of testimony which establishes the title of the plaintiff whom he has disseized. Such views have been sustained, perhaps, by some judges.

Such views are akin to that doctrine which formerly obtained, in semi-civilized times, in England, and has been characterized as—

> "That good old rule, that simple plan,
> That those should take who have the power,
> And those should keep, who can."

Such is not the law which has been enunciated by the highest judicial tribunal of this State, nor by the Supreme Court of the United States. I therefore instruct you that, *first*,

if you find from the evidence that the documentary title of the plaintiff has been accompanied by possession of the premises, his title, whether his documentary title be a perfect legal title or not, is sufficient to maintain this action against these defendants; and, *second*, if you find that the defendants entered upon the possession of plaintiff, such entry was tortious, and defendants showing no title are to be deemed trespassers; and that the rule that a plaintiff must recover upon the strength of his own title, and not upon the weakness of defendant's, is not applicable to a case like the present, but must be qualified to meet its circumstances.

Verdict—"GUILTY."

Joseph G. Baldwin, *Henry P. Irving*, for plaintiff.
E. R. Carpentier, for defendant.

GOULD *et al. v.* HAMMOND.

Circuit Court, U. S., August Term, 1857.

When a statute gives a person discretionary powers to be exercised by him upon his own opinion of certain facts, it is a rule of construction that the statute constitutes him judge of those facts.

In the exercise of that discretion, he is in the discharge not of a ministerial but a *quasi judicial* function.

To render him liable in damages for his conduct, it must be proved, either that he exercised his powers in cases not within his jurisdiction, or in a manner not confided to him, or with malice, corruptly, or oppressively.

When upon a report made to the collector by the warehouse keeper, of the perishable condition of goods, the collector directed two United States appraisers to obtain information and report to him the condition of the article; and upon their recommendation of the necessity of an immediate sale, ordered the perishable article to be sold under the *proviso* of the 12th section of the act of congress, 30th August, 1846,—

Held, that in the absence in the argument on the trial of any imputation to defendant of a corrupt motive, the shortness of the public notice of the contemplated sale was not, *per se*, sufficient evidence of fraud to warrant a judgment against the collector.

This action was brought against the defendant to recover damages arising from an alleged illegal sale of goods under his order as collector of the port of San Francisco.

A jury trial was waived by the parties, and the case left to the court on the facts and law. The former are sufficiently set forth in the opinion of the court.

McAllister, J.—It appears from the testimony, that a report having been made by the warehouse keeper that these goods were in a perishing condition, the defendant as collector directed an examination of them to be made, by two United States appraisers; and upon a report made by them that the goods were in a perishing condition and that an immediate sale was necessary, the defendant ordered the goods to be sold. They were sold at public auction, but only on a day's notice, and at prices considerably less than their real value. The defendant justifies the sale on the ground that the goods were in a perishable condition, and such sale was sanctioned by the act of congress of 6th August, 1846. (Dunlop, U. S. Laws, 1106.) The language of the *proviso* in the first section of the act, enacts, "That all goods of a perishable nature, and all gunpowder, fire-crackers, and explosive substances deposited as aforesaid, shall be sold forthwith."

It was not contended that any fraud or other corrupt motive is to be imputed to defendant. But it is urged, the goods were not in a perishing condition and the notice of the sale was not duly advertised. There is no doubt, that the notice of sale was so brief that nothing short of immediate and pressing necessity could have justified it. But unless the briefness of the notice is to be considered *per se*, in the face of the other testimony in the case, sufficient evidence of fraud or a corrupt motive, we cannot consider that fact as concluding this case. If the law left the sale to the discretion and judgment of the collector, misguided views of duty, an error of judgment, free from corrupt motive, cannot render him liable in this action. If a jury had been empaneled in this case, I would have left the evidence of the briefness of the notice of sale to their consideration as a fact on which they should pass; but the court is unwilling in a case where fraud is not imputed,

to infer it from that fact alone. The perishable condition of the goods had been reported to the defendant, by the storekeeper; he thereupon referred the matter to two sworn appraisers, and on their report he ordered the sale. It cannot be deemed practicable for a collector to inspect personally each article of every shipment supposed to be perishable. If he consults with merchants of good character, or with sworn United States appraisers, he will be deemed to have taken the usual and ordinary means of arriving at the true condition of the goods and the necessity of a sale, and the degree of promptitude required. Being *pro hac vice* a judicial officer, the defendant is not liable to an action if he falls into an error, in a case where the act done is not merely ministerial, but one in relation to which his duty is to exercise his judgment and discretion, although an individual may suffer by his mistake. (*Kendall* v. *Stokes*, 3 Howard, 87.)

If a discretion was reposed in him by law the defendant is not punishable, unless it be first proved either that he exercised the power confided in cases not within his jurisdiction, or in a manner not confided to him, as with malice, cruelty, or willful oppression. In *Otis* v. *Watkins* (9 Cranch, 355, 356), the court say, "This instruction implies that the collector is liable if he form an incorrect opinion, or if in the opinion of the jury it shall have been made unadvisably or without reasonable care or diligence. But the law exposes his conduct to no such scrutiny." If the jury believed he honestly entertained the opinion under which he acted, although they might deem it incorrect, or without sufficient grounds, he would be entitled to their protection.

This does not preclude the proof of malice or other circumstances to impeach the integrity of the transaction. In *Martin* v. *Mott* (12 Wheaton, 31), it is said, "Whenever a statute gives

a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." (*Wilkes* v. *Dinsman*, 7 Howard, 89, 132.) It is urged that the discretion of the collector may be abused and perverted to oppressive purposes. This argument will apply to every case in which discretion may have been reposed in an individual. It would be impracticable to carry on the government in all its details without confiding in some instances in the judgment and discretion of public officers; and the numerous decided cases which have enunciated the principles which regulate the responsibility of public officers in whom a discretion has been reposed by law, establish not only those principles, but the numerous instances in which the legislature have been constrained to impose on officers the duty of doing acts involving on their part the exercise of discretion and judgment. The argument that discretion may be abused, is to be addressed to the legislature as to the expediency of imparting any. When it is given, it is the duty of the court to see that the legal principles are applied to each case in which a controversy as to its exercise may arise. No better settled principle exists than the one enunciated by foregoing authorities. A contrary one, in the language of Chief Justice Taney, would indeed "be pregnant with the greatest mischief." (3 Howard, 98.) In municipal seizures, the party who seizes does so at his peril, with the knowledge that their legality is to be tried by tribunals to which the adjudication of them is awarded. If condemnation follow, he is justified; if an acquittal, he must refund in damages for the *tort*, unless he can shelter himself under some statute. The seizure is deemed a ministerial act; hence, various statutory provisions have been passed, enabling the party to protect himself in the event

the goods seized are not condemned, by procuring from the court a certificate of probable cause of seizure. These cases of municipal seizure do not apply to this case. This action is not brought for damages, for the commission of a mere ministerial act. The statute on which defendant relies, authorized and required him, as collector, to sell *forthwith* all perishable goods and explosive substances. In the performance of that duty, he had to form a judgment as to the condition of the goods, and that judgment must be necessarily based upon the facts. Now we have seen that where a statute gives a person discretionary power to be exercised by him upon his opinion of certain facts, it is a sound construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. (*Martin* v. *Mott*, 12 Wheaton, 31.) In the case at bar, the statute required him to sell forthwith, perishable articles. To sell any other would have been an abuse of power. To perform the duty imposed upon him, he must, *ex necessitate*, pass upon the question of perishability or explosiveness. How otherwise could the fact have been ascertained? The law provides no other way. His duty was not, as in case of a municipal seizure, to hold the goods to await judicial action; but having them in possession, they "shall" be sold "forthwith." How can he sell without ascertaining the condition of the goods? What can he invoke for the examination save his own intellect, the discretion and judgment to which the law had left it? If, when he is impelled by no corrupt motive, or negligence so gross as to amount to fraud, the facts on which he acted are to be submitted to a jury in every case in which a party may feel aggrieved, then those facts which the law has confided to the discretion and judgment of the collector will be transferred to juries whose verdicts in different cases might embody different results

upon similar statements of facts. It would subject the officer to indefinite liability, and seriously embarrass the government in the execution of the laws; for in a case like the present, the validity of the sale and the title of the purchaser of the goods, would depend on the opinions of the jury as to the facts acted on by the collector. It has been urged very strongly that the case of *Warne* v. *Varley* (6 D. & E. 443), is conclusive in favor of the plaintiffs in this case. Now, that case simply affirms the distinction between a ministerial and a judicial or *quasi* judicial act. The action was against defendants for an alleged illegal seizure and detention of goods. The defense was, that defendants were appointed under an act of parliament which authorized them to view and search all tanned hides and skins that should be brought to Leadenhall market. That plaintiffs had offered for sale in the market hides which had not after the tanning thereof been well and thoroughly dried, *in the judgments of the defendants*, according to the true intent and meaning of the said act of parliament; wherefore defendants had seized and carried them away until it might be duly tried in manner as directed by said statute; and that they had given due notice to the lord mayor, that triers might be appointed for trying the same according to the statute, &c. The plaintiffs replied, that the said skins were dried according to the true intent of the statute, that they had been duly tried by persons appointed by the lord mayor, who determined that the said skins were properly dried, and that said leather had been restored to them. Now, in that case the statute, so far from reposing any discretion, any *quasi judicial* power in the seizors, expressly excluded them from it by reserving the question of fact to be ascertained by others, to be appointed in the mode prescribed by the statute. The searchers were in the position of those who make a municipal seizure. They were

only justified in making seizures in cases deemed legitimate by the appropriate tribunal to which the adjudication of them was confided. The law only authorized them to seize undried leather, within the meaning of the statute; and whether the seizure was legal did not depend upon the judgment or discretion, however honest, of the seizors; but on those of others selected by the law, and subject to whose decision the seizure was made. The act of the former was deemed merely ministerial; that of the latter was *quasi* judicial. The language of Mr. Justice Lawrence renders it evident, that the distinction between the two kinds of acts was kept in view. "It is clear (he says), that in all cases, where a protection is given to a judge, it is incumbent on the party justifying the particular act to show he was acting as a judge. In this case the defendants were not acting as judges; they had seized the leather in order to carry it before other persons,—the triers, who were to act as judges." (6 D. & E. 450.) It is clear, then, that the seizors were not acting in the exercise of a *quasi* judicial power; because all discretion as to the condition of the goods was expressly vested out of them, and in others, by the very law under which themselves acted. Had *those* persons have found against the leather, and the owner had sued them, nothing short of a corrupt motive could have rendered *them* liable in damages. It does not appear to the court that the foregoing case conflicts with the principles enunciated by preceding decisions.

The second ground taken by plaintiffs is, that they are entitled, independently of all other considerations, to a verdict, because the sale of the goods was not made in conformity to law. The 12th section of the act of 1842, amended by the act of August, 1846 (Dunlop 1106), which authorized the sale, applies to two distinct classes of goods. The body of the sec-

tion refers to one class of goods to be sold, viz. such as have been deposited in the public stores, and shall have remained therein one year without the payment of duties and charges. Such it directs to be appraised by the U. S. appraisers, and if there be none, then by two respectable merchants appointed and sworn by the collector; and after such appraisement they shall be sold at public auction, on due public notice as prescribed by a general regulation of the treasury department; that at said public sale distinct printed catalogues with the appraised value thereof shall be distributed, and a reasonable opportunity afforded to persons to purchase. The foregoing details are made to protect the sale of the first class of goods; and a neglect of any one essential particular would render a collector liable. These details enumerated in the enacting part of the section, are not even inferentially alluded to when the act speaks in its *proviso* of the second class of goods, the perishable and explosive articles. This *proviso* declares, that all such shall be sold *forthwith*. It has been urged that the details regulating the sale of the first class of goods, apply to the second, mentioned in the *proviso* The office of a *proviso* is generally either to except something from the enacting clause, or to qualify and restrain its generality, or to exclude some possible ground of misinterpretation of it as extending to cases not intended by the legislature to be brought within its purview. (*Minis* v. *The United States*, 15 Peters, 445.) When, therefore, the legislature, as in this case, in the *proviso* declares that all goods of a perishable nature shall be sold forthwith, it expressly exempts such from the provisions of the enacting clause. It seems, that when congress directed the immediate sale of the second class of goods they intended to commit the regulation of the sale exclusively to the collector, as no precise rules could be prescribed without the hazard of

defeating the whole law in regard to perishable goods. It cannot, therefore be justly considered that the details of sale enumerated in the body of the twelfth section, apply to the second class of goods, referred to in the proviso. The rule of law enunciated by the decisions is well settled. The court cannot relax it. It must be uniform, though it may operate harshly in particular cases. The defendant having honestly exercised his discretion, whatever view may be taken of the erroneous or mistaken manner in which he acted, he cannot be made responsible in this case.

Let judgment be entered for the defendant.

Irving & Wistar, for plaintiffs.

P. Della Torre, U. S. District Attorney, for defendant.

THE UNITED STATES *v.* HARRILL *et al.*

Circuit Court, U. S., August Term, 1857.

Congress, in derogation of the common law, have made transcripts from the departments at Washington, evidence against public debtors.

Their mode of authentication, as prescribed by law, must be strictly pursued.

They are, when so authenticated, *prima facie* evidence of indebtedness to the United States.

Held, that the omission to give in the account the disallowed credits, under the circumstances of this case, did not render the transcript incompetent as evidence under the post-office act of July 2, 1836.

McAllister, J.—This action was brought upon a postmaster's bond. A jury trial was waived by the respective parties, and the case submitted upon the law and facts to the court, with the stipulation that the determination of the court should

be entered as its judgment, not only in this case, but similar judgments entered in the case of the *United States* v. *D. D. Harrill*, and in the case of the *United States* v. *David Jobson*, pending in this court. Two bonds were given in evidence on the trial, and certain transcripts of statements of accounts from the post-office department were proffered. These latter were objected to, on the ground that they were incompetent and insufficient. No evidence was given by the defendants.

The question is as to the competency of these transcripts, and whether they are sufficient to sustain the present action.

The acts of congress which make transcripts from the departments at Washington evidence against public debtors, introduced a new rule of evidence; but it has long since been decided by the Supreme Court that the legislature had the power to establish new rules of evidence, in derogation of the common law, by making such documents evidence. All that is required is that the mode of authenticating them, as prescribed by law, must be strictly pursued.

It is objected to the authentication of the account, that the certificate annexed does not declare the account to which it is annexed to be a "statement" of the account. The law which makes the statement of the account evidence, prescribes no form of certificate. In its 8th section it directs that the auditor of the treasury for the post-office department, shall credit and settle all accounts arising in his department, and certify the same to the postmaster general; and in the 15th section it declares that in every case of delinquency a statement of the account so certified shall be admitted.

In this case, the auditor certifies "the above to be a true and correct copy of the account of Drury D. Harrill, late postmaster at Shasta, California, as audited and adjusted at this office." A certificate that it is a true and correct copy of the

account as audited and adjusted, is more specific than one would have been had it certified generally it was a statement of the account. There is no defect in the mode of authentication.

The principal ground of objection is that the account does not exhibit on its face the items of credit which had been allowed to the party. In the case of *The United States* v. *Hodge* (13 Howard, 478), it is decided that the fact that the items of credit *disallowed* were not set forth on the face of the account, did not invalidate it as competent and legal testimony. It is difficult to ascertain why the omission of *allowed* credits should have that effect. The omission to set forth, item by item, each item of either class of credits, would not render less competent the accounts as evidence, though the omission might interfere with their sufficiency as testimony in the face of counter-evidence. They still are statements properly certified by the proper officer, and as such are competent testimony under the law. Not only such statements duly certified are made evidence, but so are all other papers pertaining to the account, certified in like manner. Each in itself, and independently of all others pertaining to the account, is competent evidence. They are not less so because unaccompanied by other documents. In the case of *The Postmaster General* v. *Rice et al.* (Gilpin, 554), an account was given in evidence, the action being on a postmaster's bond. In relation to the former, the court say, "That shows the various balances due and owing at the end of each quarter. It was the only evidence offered on the part of the United States. It was objected to; and the court charged the jury that in giving their verdict they were to consider the document as legal evidence of the facts it contained, and as such, it established *prima facie* the debt as due to the United States. (*Ibid.* 562.) That case is more conclusive, as Judge

Hopkins, who made the charge, had previously excluded as evidence a transcript from the treasury under the act of March 3, 1797. This was done in the case of *The United States* v. *Patterson et al.* (Gilpin, 44). The learned judge placed his decision on the language of that act, which requires "a transcript from the books and proceedings of the treasury," certified, &c., which language he considered intended a certificate of the whole accounts as they appear in the books of the treasury, together with all the proceedings which have been had concerning them. In the subsequent case of *The Postmaster General* v. *Rice*, the judge, in view of the difference between the phraseology of the act of March 3, 1797, and the 31st section of the post-office act of 1825, says of the latter: "It certainly was the intention of that act to substitute a statement of the settled account instead of copies of the accounts current," &c.

In *Jones* v. *The United States* (7 Howard, 681), an account, the debit side of which was similar to the one before us, was given in evidence. With the exception of dates and amounts, the debit side of the account exhibited only the quarterly balances, and was in every particular like the account offered in evidence in this case. Although elaborately argued for the defendant, no objection was made to the mode of stating the account. It is true, as urged by counsel, that Mr. Justice Daniel, in the case of *The United States* v. *Hodge* (13 Howard, 485), uses the following language: "It is true that the cases above mentioned did not arise upon the statute regulating the post-office department; but they involved the construction of the act of 3d March, 1797, the import of which, and indeed the language thereof, *mutatis mutandis*, are identical with those of the act of 1836 regulating the post-office department." (*Ibid.* 485.) The learned judge was

endeavoring to show, by reference to decided cases under the act of March 3, 1797, the admissibility of the account before the court, in a post-office case; and to illustrate their applicability, made the above observation as to the similarity of the phraseology between the two statutes. The decision of the court was, that under the principles enunciated in the decisions under one act, a certified account was admissible in a post-office case. It is urged by counsel that the Supreme Court has fixed the identity of the language of the two acts. It cannot be considered that the readings of one of the judges *arguendo* is the decision of the court.

A comparison of the language of these two statutes, will exhibit a difference. The act of March 3, 1797, requires "a transcript from the books and proceedings of the treasury," to be certified. The 15th section of the post-office act of July 2, 1836, declares that in every case of delinquency "a statement of the account, certified as aforesaid, shall be evidence, and the court trying the same shall be thereupon authorized to enter judgment and award execution."

Judge Hopkinson recognized a clear distinction between the language of the act of March 3, 1797, the post-office act of 1810, and that of 1825; and acted upon such difference, as we have seen in the adverse decisions made by him and cited from Gilpin's Reports. The difference between the two first-mentioned acts of congress is quite as great as that which occurred between the act of March 3, 1797, and the post-office acts under his consideration; and it controlled his judicial action. There can be no doubt of the competency of the testimony offered in this case, if we look to the post-office act of 1836. But, if viewed under the decisions made by the Supreme Court in construing the act of March 3, 1797, its admissibility is almost equally free from doubt.

As this question is one of great practical importance in the transactions between the government and individuals, I deem it proper to refer to certain cases relied on by counsel for defendant; as an inaccurate analysis of them will obscure a subject which ought to be clearly understood.

Much stress is laid upon the language of Mr. Justice McLean in *United States* v. *Jones* (8 Peters, 375), that "the act of congress in making a transcript from the books and proceedings of the treasury evidence, does not mean the statement of an account in gross, but a statement of the items, both debits and credits, as they were acted upon by the accounting officers of the department." The extent of what was determined by this language is to be known by referring to the state of things to which it was intended to apply it. The item objected to was in these words: "To accounts transferred from the books of the second auditor for this sum, standing to his debit under the said contract on the books of the second auditor, transferred to his debit on those of this office, $45,000." Here is a gross amount of accounts, of what number or their several amounts does not appear, no debit nor credit items,—all thrown together in one office and transferred in the aggregate to another.

The United States v. *Patterson* (Gilpin, 44), another case relied on, was where the account offered and rejected contained charges of gross amounts, referring to certain reports of file in the department. In *The United States* v. *Edwards* (1 McLean, 467), the form of the account is not given. The court say, It was objected to "because several items in the account, amounting to more than the balance claimed, were charged as balances found due by the officers of the treasury." It was doubtless rejected on that ground. The principle is enunciated in *The United States* v. *Buford* (3 Peters, 12), and *The United States* v. *Jones* (8 Peters, 375), that an account stated at

the treasury department under the act of March 3, 1797, is evidence only of items disbursed through the ordinary channels known officially to the accounting officers, and appearing on their books. This is undoubtedly correct, and applies to either act,—that of March 3, 1797, or the post-office act of July 2, 1836. So, an account duly certified is no evidence against a collector or postmaster of the payments of moneys indirectly to him through the intervention of a third party, nor of a balance due on a former account, nor of items transferred from the account of any other person, nor of items re-charged which had been before credited.

We have adverted to all the restrictions upon the admissibility of a transcript as evidence, and now turn to the account offered in this case.

It is precisely similar to the one which was before the court in the case of *Jones* v. *The United States* (7 Howard, 681), and not even objected to; and also in the case of *The Postmaster General* v. *Rice* (Gilpin, 559), where the court charged the jury they were to consider it "as legal evidence of the facts it contained, and as such, it established *prima facie* the debt as due to the United States." In the account offered in evidence, the balances both on credit and debit side are given at the end of each quarter, as due on the quarterly returns of the party as postmaster. The account is not obnoxious to the objection that there is a general balance stated. It is an account settled as it stood at the end of each quarter, and are items corresponding as to time of settlement with those which must appear on the books of the postmaster, and consequently are susceptible of comparison and correction. These several items of debit are on the debit side of the official returns of the postmaster, founded on his own quarterly returns rendered by him in pursuance of law.

The main objection to the account is, that in the adjustment of balances as due on the quarterly returns, each item of credit *allowed* should have been set forth, in order to enable the party to ascertain those credits which had been disallowed. Now, such knowledge (if it were necessary to insert the credits), would have been more directly afforded by setting forth the *disallowed* credits themselves. This, the Supreme Court have decided, it is unnecessary to do, in *The United States* v. *Hodge* (13 Howard, 478). If that tribunal did not consider the alleged necessity of inserting the *disallowed* items of credit so great as to invalidate the account as testimony if such credits were omitted, how can this court exclude it because the *allowed* items of credits are not inserted? In truth, no such necessity exists. The whole of the items are based upon the party's own quarterly returns. Under the law, the accounting officer adjusts them; and the party, if aggrieved, is allowed twelve months within which to appeal to the controller general from such adjustment. The quarterly returns themselves, where any items are disallowed, are, by the regulations of the department and the law, to be transmitted to the postmaster. It is to be presumed, in the absence of all testimony to the contrary, that the officer did his duty; that the benefit of the appeal was extended to the party in this as in every other case; and that the quarterly returns, if any credits had been disallowed, have been transmitted as adjusted to the party. Again, the debit side of this account is based upon quarterly returns made by the party himself, and furnished to the department. They are necessarily made at the end of each quarter, from the books of the post-office. If *he* does not know to what credits he is entitled, who does? Yet it is on this ground, viz., that this information should be conveyed to him, on the face of the account, that the court is

asked to exclude the testimony as incompetent. If there has been any error in the adjustment of his quarterly returns, and the party has omitted to avail himself of his right of appeal, or the exercise of it has proved fruitless, he could have compelled for correction the production of them by notice, as was done in the case of *Hoyt* v. *The United States* (10 Howard, 109). If not produced, he could have availed of his legal rights, and obtained any credit to which he was entitled, and which had been improperly disallowed; or prove error in any item with which he had improperly charged himself in his quarterly returns; or, lastly, have established his claim to any credits not previously preferred for some reason, for which the act of congress dispensed with previous presentation. It has not been brought to the notice of the court that the officers of the department have been derelict in their duty; that the party has not been furnished with his adjusted quarterly returns; or to what items of credit the party is entitled which have been disallowed. Had such showing been made, this court, under the discretion confided to it by the act of congress, would have given such direction to this case as would have placed the defendant in the position the law presumes him now to occupy in the absence of any such showing.

If this testimony is competent, is it sufficient to sustain the present action? It would seem that where the law makes testimony competent, it is *prima facie* evidence of a fact, and becomes satisfactory in the absence of all other. Such evidence throws the burthen on the opposing party; and if no opposing evidence is offered, the jury are bound to decide in favor of the presumption. A contrary verdict would be set aside. (1 Greenleaf, Ev. § 33.) But the act of congress under which this evidence is admitted, distinctly defines its sufficiency: "A statement of the account, certified as aforesaid,

shall be admitted; and the court trying the same shall be thereupon authorized to give judgment and execution," &c. What statement is here meant? Certainly the statement previously mentioned.

Whether the admissibility of this transcript of account be viewed under the construction of the treasury act of March 3, 1797, or under the more stringent provisions of the post-office act of July 2, 1836, there can be no doubt upon the point. The objection to its competency and its satisfactory character, in the absence of all counter-testimony, must be overruled.

P. Della Torre, U. S. Attorney.
Glassell & Leigh, for defendants.

ADAMS *v.* DE COOK *et al.*

Circuit Court, U. S., January Term, 1858.

In England, the validity of a will of real estate is exclusively within the jurisdiction of the ecclesiastical courts.

Such is the rule, in such of the States of the Union where the distinction between wills of realty and personalty prevails.

Under the probate laws of California, no such distinction exists.

General rule, that a party cannot give in evidence and claim title under an unprobated will in the ordinary judicial tribunals.

This rule cannot be applied to this case, upon the ground, "*lex non cogit ad impossibilia.*

The act of the legislature of this State in relation to probate of wills, has been declared, by the Supreme Court of this State, not to apply to a will executed *in California* prior to the passing of the act.

There is reason to believe that in the most remote provinces of the Spanish government, there was some interposition of judicial authority necessary to authenticate the execution of a will, although there may have been no special tribunal like the probate court.

The will before probate is not a nullity, is the foundation of title; and under the circumstances of this case evidence may be received to prove the execution of it.

This was an action of ejectment.

The plaintiff having closed, the defendant offered as the foundation of his title a document purporting to be the will of Eliab Grimes, who died on the 7th day of November, 1848, and proffered to prove the execution of the same. This document and the proof offered were objected to, on the ground that it had not been proved as a will before any judicial tribunal or functionary, and being unprobated it and the evidence offered to sustain it were inadmissible as evidence.

McAllister, J.—In England the validity of a will of real estate is a question exclusively for the adjudication of the common-law courts; and such is the case in some of the States of the Union, where the distinction exists which prevails in that country between the probate of wills of real estate and personalty.

In this State, where the general power of proving all wills is vested in a special jurisdiction known as the probate court, the jurisdiction of that tribunal is as conclusive in regard to the probate of wills of real and personal estate, as is that of the ecclesiastical courts in England in relation to wills of personalty. If, therefore, there had been a probate of this document as a will by the appropriate tribunal in this State, such action if final would have been conclusive. As a general rule, a party cannot give in evidence and claim title under an unprobated will in the ordinary courts; and under that rule, this document must be rejected as evidence. But under the peculiar circumstances of this case, that rule cannot be applied, and we must resort to the maxim, *Lex non cogit ad impossibilia.* It is true this document never has been admitted to probate, and under the rulings of the Supreme Court of this State it could not be. Professing on its face to be a will, if executed it was so prior to the passing of the act of the legislature regulating the probate of wills; and the Supreme Court of this State have decided, that the statute does not apply to wills executed prior to its passing.

"Not only (they say) does the statute fail to require wills executed before its passage to be probated; but on examination of the different sections of it, we are forced to the conclusion that this was not a *casus omissus*, and that the legislature actually intended to exclude them from the operation

of the statute, leaving their validity to rest upon the laws under which they were made."

This exposition of the statute by the highest judicial tribunal in this State, is conclusive on the point.

The next inquiry is, whether the fact that the document offered to be proved, has never been probated under the Mexican law, which existed at the time when it was made, invalidates it to such extent as to deprive defendants of the right now to prove its execution before this court?

The Supreme Court in this State, in the case of *Castro* v. *Castro* (6 Cal. 158), say, "It does not appear that there ever was a court of probate in this country; and from what we have been able to gather from our limited sources of information on this subject, such a proceeding was unknown to the laws and customs of California." If, by these expressions, the court intend to convey simply the idea that no such special tribunal as a court of probate existed in California, as would exclude the jurisdiction of another tribunal, in relation to wills, we concur in their conclusion. But there is reason to believe that, in the most remote provinces under the Spanish government, there was some interposition of judicial authority necessary to secure, in an authentic form, the proper execution of wills.

In the case of *Panaud* v. *Jones* (1 Cal. 488), in the Supreme Court of this State, where the validity of a will was sustained, it had been *dictated* by the testator, and the act was stated to have been done in the presence of the judge, and the whole signed by that functionary, who certified he was present and gives faith he knew the testator, who, to appearance, was of sound mind, and, in testimony thereof, he signed the document. As early as 1792, in Louisiana, we find a will proved before an alcalde, after the death of the testator; proof of execution was made to the alcalde, who made a decree which was

in effect a probate of the will. The Supreme Court of the United States so treated it. They say, "That question is closed by the decree of the alcalde; that decree declares the will to be valid and subsisting, and decrees its execution. We are obliged to treat this decree as the judicial order of a court of competent jurisdiction. In fact, it was the only judicial authority in the province of Louisiana, except the governor." *Fouvergne et al.* v. *City of New Orleans et al.* (18 Howard, 471). Now, it is an historical fact, that there were alcaldes and justices of the peace in California. The paper offered in evidence alludes to their existence, and to the absence of two alcaldes at the time of its execution, as a reason for their non-attendance. We think that, although there may have been no probate court, or special tribunal, analogous to that known to us, still, that neither in California, nor in any country where the civil law obtained, there was not some connection between the judicial authority and the execution of wills.

This will being unprobated under the laws of this State, for the reasons heretofore stated, and not having been proved before any judicial authority under the Mexican law existing at the time it was executed, the inquiry is, how is it to be considered by this court.

The only reason assigned for the repudiation of all jurisdiction of the probate of wills, by the ordinary tribunals of justice is, that exclusive jurisdiction over them is given to the probate courts by statute. We are unable to detect in the civil jurisprudence the delegation of exclusive jurisdiction over the probate of wills, to one tribunal, to the exclusion of all others; nor can we find any time within which the will is invalidated if not proved. There is a requisition under the Mexican law, that a publication of a will shall be made by a representation to a judge, within one month after the date of the testator's death.

But suppose this requisition to be applicable to both kinds of wills known to the Mexican law, "secret and open," the failure to prove the will does not avoid it under that law. The provision of the law requiring the publication within a limited time, seems to have for its object to stimulate the executor to prompt action in the proof of the will; for the only penalty prescribed, is the forfeiture of the legacy or bequest left to him by the will, and in case there be none, he is liable for the damages incurred by his neglect.

What, under the common law, is the position of a party claiming under an unprobated will? It certainly conveys an interest to him, which he should be permitted to vindicate.

In *Ex parte Fuller* (2 Story, 332), the learned judge asks, in referring to the revised statutes of Maine, Do they make any alteration in the operation of the common law, as to probate of wills? The 25th section of one of the statutes of Maine declared,—"No will shall be effectual to pass real or personal estate, unless it shall have been proved and allowed in the Probate Court; and the probate of such will shall be conclusive as to the due execution thereof."

Judge Story comments upon that legislation: "The argument is (he says) that under this clause the will is a mere nullity before probate, that the probate gives it life and effect from that time, and not retroactively. It appears to me that this section is merely affirmative of the law as it antecedently stood." "The will before probate is in no just juridical sense a nullity." "The will must still be the foundation of the whole title,—inchoate and imperfect if you please, until its validity is ascertained by the probate,—but still, a will and not a nullity." "The probate ascertains nothing but the original validity of the will as such. The act of the testator gives it life, his death consummated the

title derivatively from himself; and the probate only ascertains that the instrument in fact is what it purports on its face to be. It might as well be said, that a will of real estate at the common law, is a nullity until a jury has ascertained its validity, whereas the verdict ascertains only the fact that the title under the will is perfect; because it was executed by a competent testator, and therefore took effect by relation from the death of the testator."

The foundation, then, of a title in the devisee is the will; the probate of it is but the authentic means which the law provides for the ascertainment of the facts which prove its validity. Under our law, the exclusive power is given to a special jurisdiction to perpetuate those facts, whose final action is conclusive on all other tribunals. This statutory reason for the exclusive jurisdiction of the Probate Court operates to so great extent that in the case of *Gaines* v. *Chew* (2 Howard, 645), it is said, "that in cases of fraud, equity has a concurrent jurisdiction with a court of law; but in regard to a will charged to have been obtained by fraud, this rule does not hold. It may be difficult to assign any very satisfactory reason for this exception; that exclusive jurisdiction over the probate of wills is vested in another tribunal, is the *only one that can be given*." That the will is the foundation of the whole title of the devisee—that the will is in no just judicial sense a nullity—that its existence is owing to the living act, and the death, of the testator—that the acts of legislation which provide for their probate, are acts not of creation but merely of evidence,—are not to be doubted. This document could not, nor can be, admitted to probate in this State under our law; it cannot be proved by any Mexican functionary in this State, for none such exists.

The complainant, therefore, is remediless unless proof of the execution of this document, now offered, is admitted. He

should have that right. In the case of *Bagwell* v. *Elliott* (2 Rand. 195, 198, 199), a kindred point was discussed. That court, after deciding that the act of the legislature of Virginia had vested in the Probate Court of that State jurisdiction generally over the probate of wills of real and personal estate, and made its action conclusive proof of their validity, say—

"But, it does not follow from the fact that it was necessary either to the validity of the will of a real or personal estate, or that no other proof was admissible as to a will of lands."

"Nor does the recognition of an authority to compel the production of the will, or the direction that the original will shall remain amongst the records, lead to the inference, that a probate was necessary to the validity of a will of lands." Again, they say, "The various acts on the subject being made only to provide a tribunal for granting probates in this country as a substitute for the ecclesiastical courts in England, a probate was not necessary here but for the purpose for which it was necessary there, to wit, to enable the executor to sue; and that for all other purposes without probate in England *the will* was valid; and so the acts of the legislature, making the probate of the will conclusive as to lands, but without requiring such probate as a prerequisite to the validity of the will as to lands, left it, if not proved, to the Court of Probate, to have the same effect as if the acts had not been passed; that is, that the effect given to the probate of the will, which was given for the benefit of those claiming under it, no longer existed. If the effect of the acts of the legislature was to declare the will invalid if not proved in a court of probate, then those acts, in many cases, would have been prejudicial to those claiming under the will."

"The only effect of the probate is to afford one mode of proof that the will is genuine; but the mode of proof allowable before these statutes, is not abolished by them,—that is, by

evidence on the trial. If a will had been offered for probate and rejected, this might be used thereafter as the decision of a competent tribunal, and would condemn it forever."

If it be admitted that the law which prevailed in California when the will offered in evidence was executed, prescribed a proceeding for the proof of wills, such proof could constitute no more than a probate under our law would; unless some law of Mexico had declared them void without such proof, of the existence of which this court is not apprised.

After the fullest consideration the court has been able to give this question, it is arrived at the conclusion, that the evidence offered is admissible, and that the complainant may submit, under the instructions of the court, the evidence on which he relies to prove the execution of the document offered as the will of Eliab Grimes.

The evidence objected to having been submitted to the jury, which, with the other testimony, occupied several days, the following instructions were given to the jury.

1. A will executed under the Mexican government, as the one in controversy was, in the presence of only two witnesses, was invalid; but under the decision of the Supreme Court of this State, desirous to conform to the decisions of the highest State court in relation to the law which regulates the transfer of real estate within the limits of the State, I instruct you, if you shall be satisfied from the testimony that a usage or custom had prevailed in California uninterruptedly for the space of ten years, so uniform and notorious that it may fairly be presumed to have received the tacit consent of the country, which authorized the execution of wills in the presence of two witnesses only, the clear proof of the existence of such usage will operate a repeal of the previous existing law, and two wit-

nesses will be sufficient. If such proof has not been afforded, and if three competent witnesses have not attested the codicil "C," given in evidence in this case, it is a nullity.

2. The witnesses (whether two or three) must be competent.

Should you be satisfied from the proofs that the said codicil "C" was written in Spanish, that any of the attesting witnesses was ignorant of that language, that he could neither read nor speak it; that the testator was unacquainted with it, and could not understand it when read, or that neither he nor one of them could understand the disposition of the property made by the will, and no sworn interpretation of the will was made to them, then I instruct you that such witness or witnesses cannot be considered as competent.

3. The signature of each and every witness, and of the testator, must be satisfactorily established. The proof of one or any number less than the whole, will only prove that so far as each of them is concerned, it is well executed; but will not tend to establish the document as a will.

4. In relation to the verbal declarations of the testator, they cannot be considered as competent to prove the execution of the will. They are general declarations, the truth of which comport with the existence of any will other than that in controversy. These declarations, made under the circumstances, are proof simply of the existence of *a* will.

5. If the signature of each and every witness of the number sufficient be proved, and the signature of the testator, then I instruct you the satisfactory proofs of those facts afford evidence from which you may presume a due execution of the codicil ("C"), in the absence of what you may deem counteracting testimony.

6. That this presumption is sometimes termed "an intendment," at others "an inference," it is in fact only "prima-facie" proof, and exists only so long as there is no evidence to coun-

teract it. If, therefore, it has been proved to your satisfaction that the codicil ("C") was written in the Spanish language, that on its face it professes to be executed before Mexican functionaries, which it was not, that one or more of the witnesses did not "speak" or "read" the Spanish language, that the testator was equally ignorant of it, that no other proof than the legal presumption to which I have alluded has been given to show a communication of the contents of the will had been made between the testator and the witnesses,—then I instruct you, if these facts have been proved, they must be duly considered by you; and if, in view of all the other testimony, they counteract the presumption arising out of the proof of the signatures of the testator and witnesses,—in that case, the legal presumption will be rebutted. To conclude, if the facts in this case induce you to believe, that if the attesting witnesses were alive and present, they could not testify to the dictation or nuncupation of his will by the testator to the witnesses, or that it was read in his and their presence, and understood by them,—then I instruct you, the proof made at this trial of the signatures to the document ("C") cannot establish it as the last will of Eliab Grimes. On the contrary, if the facts of the case do not thus influence you, the presumption to which I have alluded must control your action.

7. The codicil ("C") is attested by one Robert T. Ridley, as syndic; such office under the Mexican government, being a mere ministerial office without judicial functions, gave him no authority to authenticate the codicil. His act as an official act was void; but he signed with the declared intention to testify to the contents of the will; and his official prefix may be disregarded, and he considered as one of the witnesses.

The jury returned a verdict for the defendants.

Hall McAllister & E. M. Gould, for plaintiff.

Crockett & Crittenden, for defendants.

BYRD *et al. v.* BADGER.

Circuit Court, U. S., January Term, 1858.

DISCHARGE under the insolvent law of a State cannot be pleaded in bar of an action on a foreign contract.

A, a citizen and resident of California, through his agent in Boston made a note to B, a citizen and resident of Massachusetts, payable in Boston:—

Held, that in such case, A could not plead his discharge in California under the insolvent law of that State, to an action brought by B in California.

A trial by jury was waived by the parties, and the case submitted to the court upon the law and facts, as disclosed by the pleadings. The facts are sufficiently set forth in the opinion of the court.

MCALLISTER, J.—The pleadings in this case exhibit these facts: That plaintiffs are citizens of the State of New York, and were residents of the city of New York in September, 1856, where they have since resided, and still remain; that at the same date, the defendant was a citizen and resident of the State of California, where he still resides; that on the 1st day of September, 1856, the defendant, by his attorney, one E. Griffin, made and delivered to the plaintiffs his promissory note, payable eight months after date, to their order, for seven hundred and thirty-four dollars. The note was dated at Boston, where it was made, and where, by its terms, it was made payable. The answer of defendant sets up as a defense to the action, that since the maturing of said note

the defendant had taken the benefit of the insolvent law of this State, which he pleads in discharge of the present action.

The question is, Does the fact pleaded constitute a bar to the action of plaintiffs? The plaintiffs were citizens and residents of the State of New York, and the defendant was a citizen and resident of the State of California, at the time of the making of the contract; and the note was a Massachusetts contract, dated and made payable in Boston.

The general rule is, that if the parties to a contract were, at the time it was made, citizens and residents of the sovereignty or State in which it was made, and it is to be performed or discharged under the law of that State, a discharge of the debtor in that State will bind the creditor, and bar his action in any other. The note sued on is not within the operation of the general rule; and being a foreign contract, and the parties not resident at the time it was made in the State where it was made, it comes within the operation of the principle that the insolvent law of a State operates intra-territorially, and cannot affect foreign and extra-territorial contracts. It is only necessary to refer to a few of the decisions to show the practical application of this principle.

In *Boyle* v. *Zacharie* (6 Peters, 635), the contracts sued on were made in New Orleans. The defendant, being a resident of the State of Maryland, entered into the contracts by his agents in New Orleans, with the plaintiffs, who were residents of Louisiana. On an action brought against defendant in Maryland, it was held that the contracts were Louisiana contracts, and the discharge of defendant under the law of Maryland, constituted no defense to the action.

In *Cook* v. *Moffat* (5 Howard, 295), it was decided that notes drawn in and dated at Baltimore, but delivered in New

York, in payment for goods purchased there, are payable in and to be governed by the laws of New York. The insolvent law of Maryland, it was said, could not discharge one of its own citizens from a contract made by him with citizens of another State.

In *Ogden* v. *Saunders* (12 Wheaton, 255), Mr. Justice Washington, alluding to the case of *McMullen* v. *McNiel* (4 Wheaton, 209), says, "But I hold the principle to be well established, that a discharge under the bankrupt-laws of one government does not affect contracts made or to be executed under another, whether the law be prior or subsequent in the date to that of the contract; and this I take to be the only point really decided" in that case.

In *Farmers and Mechanics' Bank* v. *Smith* (6 Wheaton, 131), it is stated that an insolvent act which discharged the debtor from pre-existing *contracts* is void; and an act which operates on future contracts is inapplicable to a contract made in a different State, at whatever time it may have been entered into.

The court having had the case committed to it on the law and facts, finds the following facts:

First. That the plaintiffs, at the time the contract sued on was made, were citizens and residents of the State of New York.

Second. That the defendant, being at the time a citizen and resident of the State of California, by his attorney, one E. Griffin, made and delivered to the plaintiffs a promissory note of the following tenor:

"$734. Boston, September 1, 1856.

"Eight months after date I promise to pay to the order of Byrd & Hall, seven hundred and thirty-four dollars and

ten cents, value received, payable at office, 15 East Clinton Street.

W. G. BADGER,
By E. GRIFFIN, Jr., *Atty.*"

Third. That, subsequent to the making of said note, defendant obtained a discharge under the insolvent act of this State.

Wherefore the court finds, as a conclusion of law from the foregoing facts, there is due from the defendant to the plaintiffs the sum of seven hundred and thirty-four dollars, with costs of suit. And that the matters and things set forth in the answer of defendant, if true as they are shown and set forth, do not constitute a defense to this action.

W. W. Crane, for plaintiffs.
Crockett, Baldwin & Crittenden, for defendant.

FREMONT *v.* THE MERCED MINING COMPANY.

Circuit Court, U. S. January Term, 1858.

WHERE no want of jurisdiction is patent on the record, the proper mode of availing of such defect is by plea.

Where a plea to the jurisdiction is interposed, the court will direct an argument of the plea to be made forthwith, and intermediately direct a temporary injunction to issue to keep the parties in *statu quo* until the plea is disposed of.

Where proper averments are made in the bill to give jurisdiction, they give *prima facie* jurisdiction to the court, and enable them to do justice between the parties in cases of irremediable mischief by the issue of a temporary injunction until the plea to the jurisdiction has been disposed of.

The bill in this case was filed to enjoin the working of a gold mine.

A plea to the jurisdiction was filed, and motion for injunction was met by the objection that the court had no jurisdiction.

Argument of plea ordered forthwith, and the issue of fact given to the jury.

MCALLISTER, J.—The bill in this case was filed to enjoin the excavation of gold from land alleged to be the property of the complainant. The bill was met by defendants with a plea to the jurisdiction of the court, on the ground that the complainant was not a citizen of the State of New York, as alleged in the bill, but was a citizen of California at the time; and that therefore the complainant could not sue the defendant, who is also a citizen of this State, in this court. A motion was then made on behalf of the complainant, for the issue of an injunction; which was resisted upon the ground that pending

the plea to the jurisdiction, the court could take no further proceeding in the cause. To enjoin an alleged irreparable mischief is the object of the present proceeding. No defect of jurisdiction appearing on the record, the proper mode to avail of it is by plea. It is contended, however, that the filing of the plea has the effect of arresting all further proceedings in this court, and that it can make no order in regard to the injunction until the plea is disposed of. That the court cannot grant a perpetual injunction or hear an argument upon it, is evident. It will direct an immediate argument of the plea; and in a case of irreparable mischief alleged and not denied, it can issue a temporary injunction to stay the mischief until the obstacle interposed by the defendant's plea shall be removed. It cannot be that, assuming the fact averred in the plea may be true, the court must remain passive and permit the mischief to be wrought, because its jurisdiction has been questioned?

The case is simply this: The complainant in his bill has made the proper averments of citizenship to give jurisdiction to the court. So far, then, as the record is concerned, the jurisdiction of the court is perfect. The effect of such averments is to impart, *prima facie*, jurisdiction; and it is incumbent on the defendant who would impeach that jurisdiction for causes *dehors* the record, to do so not only by allegation but proof. Until this be done, the prima-facie jurisdiction derived from the record authorizes the court to retain the suit in such position as to enable it to preserve the rights of the respective parties in *statu quo* until the intervening obstacle to a decision on the merits is disposed of. An immediate opportunity will be afforded to the parties, the one to sustain, the other to falsify it. The issue, arising as it does in an equity suit, might be tried by the court. Such seems to have been the course pursued in the case of *Shelton* v. *Tiffin and others* (6 Howard,

163). But as it is within the power of the court to inform its conscience by the verdict of a jury, the facts establishing the citizenship of plaintiff either in New York or this State, will be referred to a jury. Various cases have been cited; all, however, were common injunctions in which *pleas* or *demurrers* were filed. Even in such, the court have always speeded the trial of the issue raised by the *demurrer* or *plea*, in order to promptly reach the injunction.

In an anonymous case (2 Atk. 113), it is said, "Where defendant has put in his plea to plaintiff's bill, the plaintiff cannot move for an injunction to stay defendant from proceeding at law till the plea, by some means or other, is removed out of the way; all that the plaintiff can do is, to move that the plea may be accelerated; which the court did."

In *Cousins* v. *Smith* (13 Vesey, 166), Lord Erskine plainly indicates, he would have removed a *demurrer*, under similar circumstances, by ordering it to be argued immediately.

In *Humphreys* v. *Humphreys* (3 P. Wms. 395), the court said, upon motion of an injunction to stay, &c., after a *plea* put in, there can be no motion for an injunction; but, at the instance of the plaintiff, it was ordered that the *plea* should come on for argument the next day, and if overruled the plaintiff might move at the same time for an injunction.

If, therefore, a motion shall be made by the plaintiff to accelerate the removal of the *plea*, the court will direct the immediate trial of the issue raised by it. If no immediate disposition of it can be made, it will issue such order as will maintain the parties in *statu quo* until such is made.

Hall McAllister, solicitor for complainant.

Cook & Fenner, for defendants.

The issue of citizenship was submitted to a jury; who having returned a verdict in favor of the plaintiff, the following order was placed upon the minutes of the court:—

CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICTS OF CALIFORNIA.—NORTHERN DISTRICT OF SAID STATE.

John C. Fremont

v.

Merced Mining Co. and others.

Whereas, heretofore, a trial was had in above action in this court, on the law side thereof, before a jury impaneled for said trial, on the 14th, 15th, 16th and 17th days of June, 1858, upon the following issue: Whether John Charles Fremont was at the commencement of this action, viz., on the 8th day of May, 1858, a citizen of the State of California?

And, whereas, the plaintiff and defendants appeared by their respective counsel, and evidence was adduced by both parties in reference to said issue at said trial; and, whereas, the said issue was duly submitted to the jury so impaneled as aforesaid, and thereafter said jury did render a verdict in the words and figures following, namely:

"The jury in this case unanimously agree that John Charles Fremont was not, at the commencement of this suit, on the 8th May, 1858, a citizen of the State of California."

"San Francisco, June 17, 1858."

Now, I do hereby certify that said verdict was found as aforesaid; and I further certify it is satisfactory to me.

M. HALL McALLISTER,
Circuit Judge, Circuit Court, U. S., for Dist. Calif.

San Francisco, June 18, 1858.

THE UNITED STATES OF AMERICA *v.* PARROTT *et al.*

Circuit Court, U. S., July Term, 1858.

On a motion for injunction to enjoin waste, the complainant cannot, on bill and answer, read affidavits in support of his title.

The general rule is, that all persons interested in the object of the bill, are proper parties. There are qualifications to this rule; and the court will not suffer it to be so applied as to defeat the purposes of justice.

On a motion to dissolve an injunction, matters set up by way of avoidance in the answer responsive to the bill, should be deemed, on such motion, equivalent to an affidavit by the defendant. Such matters, on the final hearing, must be proved by the defendant.

The jurisdiction of this court is limited to certain persons and matters, but within those limits it can confer a remedy when a plain, adequate, and complete one cannot be had at law. In the exercise of its equity jurisdiction within those limits, it can afford relief where it can be afforded by the principles of the High Court of Chancery in England.

Injunction may issue to stay irreparable mischief or waste, in cases of disputed title.

Where the answer denies, directly and positively upon personal knowledge, the allegations of the bill, it "denies the equity of the bill," and, acting upon it as evidence, the injunction will be dissolved by the court, in the absence of extraordinary circumstances.

Query:—Whether, in a case of irreparable mischief, the court will permit affidavits to be read in contradiction to positive denials of the answer?

Where fraud, forgery, and ante-dating are distinctly alleged in the bill, and the only denial of them is on "information and belief," it is not a "denial of the equity of the bill," and cannot arrest the issue of an injunction, or authorize a dissolution of it if one has been granted.

The working of a gold mine is the taking away the substance of the estate.

Mere insolvency, if inconsiderable, would not give jurisdiction to the court; but where the amount is great, and the inability of the party to respond is greatly disproportioned to that amount, such insolvency would be an element to influence the action of the court, and where it exists is proper subject for an allegation in the bill.

The United States have not conveyed or dedicated the minerals in the public lands to individuals or the public.

The institution of an action at common law, prior to the exhibition of a bill in equity, for injunction, is the general rule; but such action is not an *indispensable* prerequisite in all cases.

A court of equity will, in some cases, enjoin against the removal of the fruits of past waste.

The bill in this case is filed for an injunction, and the appointment of a receiver. The object is to restrain the working of a quicksilver mine, known as the "New Almaden," of the alleged value of $2,500,000, and from which defendants are extracting minerals to the annual value of $1,000,000. It alleges that the title under which defendants claim to hold possession, is derived from the Mexican government, and that the same, independently of all other defects, is forged and ante-dated. That defendants have, through one Andres Castillero, in their own behalf, petitioned the board of land-commissioners organized under the act of congress of March 3, 1851, for a confirmation of their claim; which application is now pending on appeal before the District Court of the United States for the Northern District of California. The bill prays for an injunction to enjoin the destruction of the mine until the title to it is determined by the tribunals to which its adjudication is finally confided.

McAllister, J.—The magnitude of the interests involved, the novelty of this case in some of its features, the fact that the documentary title on which the defendants to a certain extent rely, was obtained from Mexico pending the war between that country and this, a few weeks prior to the occu-

pation of this country by the American forces, the allegation that such documentary title was procured by a conspiracy to defraud the United States and was forged and ante-dated,—are circumstances which have invested this case with no ordinary interest outside these walls. That interest has been reflected upon those who have appeared in court as the representatives of the respective parties, as evidenced by the strenuous and zealous efforts which have been made by the respective counsel. This court is reminded by this condition of things, of the remarks of Chief Justice Marshall, in *Mitchel and others* v. *The United States* (9 Peters, 723). "Though the hope of deciding causes to the mutual satisfaction of parties would be chimerical, that of convincing them that the case has been fully and fairly considered, that due attention has been given to the arguments of counsel, and that the best judgment of the court has been exercised on the case, may be sometimes indulged. Even this is not always attainable. In the excitement produced by ardent controversy, gentlemen view the same object through such different *media* that minds not unfrequently receive therefrom precisely opposite impressions. The court, however, must see with its own eyes, and exercise its own judgment, guided by its own reason."

The present proceeding may be viewed as in the nature of an information on the part of the government through its law-officer. It is a bill filed by the district attorney of the United States in their behalf. It sets out the title of the United States to certain premises; that defendants are in possession of said premises, which consists of a mine of vast value, and are extracting its minerals to an amount in value of $1,000,000 per annum, and have abstracted already minerals to the amount of $8,000,000. It charges their possession to be tortious, and that the title under which defendants hold such pos-

session was forged, false, antedated, and fabricated in pursuance of a conspiracy formed to cheat and defraud the United States of their rights to the said property; that defendants have filed a petition in the name of one Andres Castillero to the board of land-commissioners under the act of congress passed 3d March, 1851, which is pending on appeal before the District Court of the United States, for the Northern District of California, the object of which petition is to obtain from the United States a confirmation of the title which they pretend to hold from the Mexican government. It further alleges that defendants are destroying the substance of the mine, that they are unable to respond for the damages which have already accrued and still may accrue, and prays that an injunction may issue to stay the waste they are committing and threaten to commit, until the determination of the title by the tribunals to which the adjudication of it is confided by law shall take place, and that a receiver be appointed to take charge of the property intermediately.

This bill has been met by a demurrer and an answer. Double pleading in a court of equity is not allowable; and the answer in this case being a general one, overrules the demurrer upon the settled doctrine of the court. *Taylor* v. *Luther* (2 Sumner, 230.) So that the demurrer may be dismissed without further observation, and the case stand on the bill and answer. (*Ibid.*)

When the motion for injunction was made, the solicitors for defendants objected to any affidavit offered by complainants as to title. It was agreed that such affidavit might be read, and its admissibility argued on the discussion by counsel of the merits, and decided by the court in its opinion. Affidavits for defendant responsive to those on the part of complainants as to title, were admitted to be read, subject to the decision which

should be made by the court on the admissibility of the complainants' affidavits to title.

This motion for an injunction could be disposed of in a comparatively brief time; but the objections urged against the jurisdiction of the court, and to the character and form of this proceeding, have been numerous, and urged with so much zeal and apparent conviction in their correctness, that it is proper that special notice should be taken of them, in the hope of convincing parties that the court has "fairly considered the case, that due attention has been given to the arguments of counsel, and that the best judgment of the court has been exercised in the case."

The first question, then, is the admissibility of affidavits as to title, presented by defendants.

The right of the plaintiff to read affidavits on a motion for injunction is declared to be a well-settled rule. It is his unquestionable right, say the court in *Kensler* v. *Clark* (1 Richardson, 620) to read affidavits on an application for an injunction in the support of the allegations in his bill before the coming in of the answer; and as constituting a part of his case, they may be read on any subsequent motion to perpetuate or dissolve the injunction. But the court lays down the rule that no affidavits filed subsequently to the coming in of the answer can be read, for the reason it was calculated to surprise the defendant. The only exception to this rule of the right of plaintiff is to be found in the cases of waste and such as are analogous, for the purpose of preventing irreparable mischief; and that exception limits the affidavits to waste, insolvency, or other collateral fact, and does not permit them to extend to the question of title. This exception as to affidavits as to title was asserted by Lord Eldon in *Morpeth* v. *Jones* (19 Vesey, 350), and in *Norway* v. *Rome* (*Ib.* 157); and seems to be recognized by the text-writers, by

the case cited above from South Carolina, and by other decisions.

Mr. Justice Story, in the case of *Poor* v. *Carleton* (3 Sumner, 70, 77), has intimated his doubts as to the existence of a good reason for the rule which denies the right of a complainant to read affidavits as to title, in a case of irreparable mischief; and the remarks of the learned judge upon the point are entitled to much consideration, and may lead hereafter to a qualification of the rule. The proposition for which he contends is, that affidavits to title should upon general principles be looked to, not for the purpose of establishing title, but to enable the court to see if probable foundation existed to believe that the complainant may establish his title and be liable intermediately to irreparable injury.

In the case of *Tobin* v. *Walkinshaw*, decided by this court, it went into a full consideration of the case of *Poor* v. *Carleton;* and inasmuch as the point was not directly before the court in that case, and the learned judge in that case admitted that affidavits to title were only to be looked to for a qualified purpose, considering too, as well settled, that on a motion for an injunction a court of equity is not to look into title, this court came to the conclusion it would be better to adhere to the ancient rule until qualified by some authoritative decision directly on the point. The court, therefore, decided that affidavits to title could not be read. The law announced in that case must be applied to the present, and so much of the affidavits of plaintiff in this case as goes to title must be discarded by the court in the adjudication of this motion. The affidavits of the defendants, which were admitted to be read as responsive to plaintiff's affidavits, must be also rejected. As the court excludes the plaintiff's, on a consideration of the question of their admissibility, which by consent of parties

when they were read was reserved for its decision, the affidavits of the defendants must share the same fate. The only ground on which they could be received was, that they were responsive to the affidavits of complainant as to title. In the absence of any such, no rule is better settled than that defendants cannot read affidavits to support their answer. (1 Hoffman's Ch. P., 360; *Roberts* v. *Anderson*, 2 Johns. Ch. R., 202.) In the language of *Lord Eldon*, in *Norway* v. *Rowe*, (19 Vesey, 157), "The title must be taken on the answer." The case, therefore, is to be discussed on the pleadings—the allegations in the bill as verified by the affidavits accompanying them, exclusive of any portion of them which go to title, and the denials in the answer.

A preliminary inquiry is, as to the jurisdiction of the court as to the parties.

The decision of this court in the case of *Tobin* v. *Walkinshaw*, has been cited as an authority which settles the question raised in favor of the objection taken by the defendants' counsel to the jurisdiction of this court, on the ground of want of parties.

A reference to the structure of the bill in that case and in this, will show that, whatever may have been the language of the court *arguendo* in that case, it can not be cited as an authority in the present. In that case, it was alleged that defendants held under a conveyance from one Andres Castillero. There was no allegation that he was beyond the jurisdiction of this court, nor any prayer that he might be brought into court, should he at any time come within the reach of its process. It prayed for the cancellation of deeds in the hands of absent persons; it prayed for an account of all the profits of the mine for the preceding year, and for a perpetual injunction. By the subsequent pleadings it was ascertained, that two persons resi-

dent in this city, within the jurisdiction of this court, equally interested with defendants, were not made parties to the bill. It was in relation to such a bill the court said, "But the bill asks, that an account of profits belonging to other people be taken, and title-deeds to property in which those other and absent persons are as much interested and to a larger extent than the defendants themselves, shall be canceled." The court further said, "But there is one feature in this case which distinguishes it from all others. It is, that two absent persons (Parrott and Bolton), whose interests would be affected by a decree, are residents of this city, and within the reach of the process of this court. But if by bringing them before the court, this case would be beyond the jurisdiction of this court, can the court by indirection adjudicate upon their rights, and thus do indirectly what it could not do directly?"

Now, the present bill makes all persons in interest, within the reach of the process of the court, parties to the bill. It alleges, that certain persons who are absent from this State hold possession of the mine, by the defendants as their agents, and prays, if they come within the jurisdiction of this court, they may be made parties. It asks for the delivery and cancellation of no deeds, nor any account of profits. It asks from the defendants the value of the ore extracted and carried away by either of them, or by any other person with license and consent of them, or either of them, while in possession, as alleged wrongdoers, of the premises.

It alleges, that under the act of 3d March, 1851, entitled "An act to ascertain and settle private land-claims in the State of California," a petition in conformity with the provisions of that act has been submitted to the board of land-commissioners in the name of one Andres Castillero, for and in behalf of defendants, asking for a confirmation of the

claim to the premises in dispute held under a Mexican title; which proceeding is pending on appeal before the District Court of the United States for the Northern District of California, before which tribunal the alleged title of the premises is now awaiting adjudication. The bill prays for an injunction to enjoin the destruction of the premises before the termination of that adjudication.

The averment of the answer which raises the objection to the jurisdiction is, that certain persons resident in foreign countries are associated with defendants, and the names of some of them are unknown. The lands and mine are admitted to be in possession of the agents of the company of which the said non-residents are parties. The question presented is, whether where the parties are prosecuting a claim in the District Court by their attorneys, and holding possession and enjoying the proceeds of the premises by their agents, the court has the power to protect the property, or is deprived of that power because some of the parties are without the jurisdiction of the court.

The affirmative of this proposition, if sustained, would be attended with singular results. It would only be necessary for parties to associate themselves with foreign parties who were beyond the process of this court, and entire exclusion from any equitable relief required by others who may have rights to or claims on the property in their possession, would be the result.

The general rule in a court of equity is, that all persons who are interested in the object of the bill are necessary and proper parties. There are exceptions to this rule, which are governed by one and the same principle, which is—as the object of the general rule is—to accomplish the purposes of justice between all the parties in interest; and it is a rule

founded in some sort upon public convenience and policy, rather than upon positive municipal or general jurisprudence. Courts of equity will not suffer it to be so applied as to defeat the very purposes of justice, if they can dispose of the merits of the case before them without prejudice to the rights of other persons who are not parties, or if the circumstances of the case render the application of the rule impracticable. (Story's Eq. Pl., § 77.) The first exception to the rule stated by Judge Story is founded upon the utter impracticability of making the necessary or proper parties, by reason of their being beyond the process of the court. (*Ibid.* § 79.) This ground of exception is peculiarly applicable to suits in equity in the courts of the United States. If, therefore, this rule as to parties were of universal application, many suits in those courts would be incapable of being sustained therein; and Judge Story states that the general rule in the courts of the United States, is to dispense, if consistently with the merits of a case it can possibly be done, with all parties over whom the court would not possess jurisdiction. (*Ibid.* § 79.)

Parties to bills are divided into three classes—nominal, necessary, and indispensable.

The act of congress of 28th February, 1839 (5 U. S. Statutes, 321), and the 47th rule of equity of the Circuit Courts of the United States, were enacted to remove the disability alluded to by Judge Story, in the Circuit Courts, in the administration of justice, where some of the parties were beyond the jurisdiction of the court. The judicial construction placed upon those enactments is, that they have dispensed with the duty of making nominal or necessary parties where it is impracticable to do so by reason of their being beyond the reach of the process of the court; but the presence of an indispensable party is as necessary to the jurisdiction of the court

as it was before the enactment of the rule and the law. The presence of an indispensable party is demanded by the consideration that no court of equity, however general its jurisdiction, can adjudicate directly upon the rights of a party unless he is actually or constructively present. (12 Wheaton, 194.) The absent parties are undoubtedly necessary parties, and had they been within reach of the process of this court, must have been made parties to the record. But are they, under the circumstances, so indispensable as parties, as to prevent any decree by this court.

In this case it is alleged in the bill, that certain parties reside out of the jurisdiction of this court; and it prays that they may be made parties whenever they shall be found within its jurisdiction, in conformity with the 22d rule of equity. The answer admits that they reside beyond the jurisdiction of the court, and the names of some of them are unknown to defendants. It admits the possession of the property by the agents of those absent parties, which agents are made parties to this bill. The same parties are in the District Court prosecuting a claim to the same property in the name of Andres Castillero against the plaintiffs. No act is required to be done by these parties. They are before the District Court, where their rights in the property are to be adjudicated. Not actually, they are constructively present on this motion.

In the case of *Osborn* v. *United States Bank* (9 Wheaton, 738), the bill was against, and the decree was rendered against, an individual who was the agent of another, who was not a party to the bill, being a sovereign State, and who could not be made a party. The objection in that case was, that as the real party cannot be brought before the court, a suit could not be sustained against the agents of that party. "Why," ask the court, p. 843, "may not it [this court] restrain him from the

commission of a wrong which it would punish him for committing?" The case of *Osborn* v. *United States Bank* was a demand for money of the principal in the hands of an agent, which belonged to a principal not a party to the record. Hence, this court in its opinion in the case of *Tobin* v. *Walkinshaw*, in commenting on that, stated as one of the grounds of difference that in the case of *Tobin* v. *Walkinshaw* "there is no question of principal and agent in this case."

There would seem to be no reason to restrain the court from acting, for want of parties. To do so in this case, would be a denial of justice. The parties, while using another judicial tribunal for the confirmation of their alleged title, would be enabled by reason of the absence of some of them without the jurisdiction, to bar the party against whom they are prosecuting their claim to the property, from the interposition of this court to preserve and protect that property pending such prosecution. The foreign parties would thus be making use of an American tribunal to enforce their claim, while they availed themselves of their absence to preclude the complainants from a right to which the humblest individual is entitled, —to invoke an injunction for the preservation of the property; for only to that extent can the action of this court go.

Judge Story lays down the ordinary rule to be, that where the persons who are out of the jurisdiction are mere passive objects of the judgment of the court, or *their* rights are merely incidental to those of the parties before the court, then, inasmuch as a complete decree may be obtained without them, they may be dispensed with. If such absent persons are to be active in the performance and execution of the decree, or if they have rights wholly distinct from those of other parties, or if the decree ought to be pursued against them, they are indispensable. (Story Eq. Pl., § 81.)

Speaking of a defect for want of parties, this author says, "In many instances the objection will be fatal to the whole suit. In others, it will not prevent the court from proceeding to the decision of other questions between the parties actually before it, even though such a decision may incidentally touch upon or question the rights of the absent parties." (*Ibid.*)

In *Smith* v. *The Hibernian Mine Co.* (1 Sch. & Lefroy, 238), Lord Redesdale says, "The ordinary practice of courts of equity in England, when one party is out of the jurisdiction and other parties within it, is to charge the fact in the bill; and then the court proceeds against the other parties, notwithstanding he is not before it. It cannot proceed to compel *him* to do any act, but it can proceed against the other parties; and if the disposition of the property is in the power of the other parties, the court may act upon it." I remember (says the chancellor), a case where a bill was filed to sell an estate for payment of debts, and the heir at law who was entitled to the surplus after payment of debts, was out of the jurisdiction. The court ordered the estate to be sold for the payment of debts; the heir [say the court] might file a bill to set aside the proceedings if they were erroneous.

In the case at bar, no act is required to be performed by the absent parties in the execution of the decree; their interests are incidental only to those of defendants, and they are passive parties; the possession of the property is in them by their agents. They may come into this court at any time; they are, in the name of Castillero, prosecuting for the confirmation of their claim to the property in the hands of their agents, the defendants.

The case of *Coiron* v. *Millaudon* (19 Howard, 113), has been cited by defendants' solicitors. In that case, the bill was filed to set aside a sale of property on the ground of irregu-

larities in insolvent proceedings. If the sale were set aside, the defendants would have been enabled to recover from the creditors who had received their money. The court say, "The creditors, therefore, are the parties chiefly concerned in these proceedings, and as it respects those to whom the proceeds of the estate have been distributed, they are directly interested in upholding the sale; for if it is set aside, and the proceedings declared a nullity, they would be liable to refund the share of the purchase-money each one had received in the distribution."

This latter case simply affirms the principle announced in *Mallow* v. *Hinde* (12 Wheaton, 194), and in *Tobin* v. *Walkinshaw*, decided by this court, that indispensable parties, as they were considered in those cases to have been, could not be dispensed with.

We cannot consider the objection to the jurisdiction for the want of parties as tenable.

Whether the answer should be regarded on this motion more than an affidavit, is the next question which has been raised. The ancient doctrine may be as contended for by the solicitors of complainants; but we think that upon the ground of reason and more recent authority, all direct denials in the answer responsive to the allegations of the bill, and not matters of avoidance, ought to have the effect of an answer as evidence on this motion as on a final hearing.

On a motion to dissolve an injunction, Mr. Justice Story says, the ground of "dissolving an injunction upon a full denial by the answer of the material facts is, that in such a case the court gives entire credit to the answer, upon the common rule in equity, that it is to prevail, if responsive to the charges of the bill, until it is overcome by the testimony of two witnesses, or of one and other stringent corroborative circumstances." (3 Sumner, 77.)

It is evident, then, that Judge Story considered that even on a motion to dissolve an injunction, the same effect was to be given to the answer as is to be given to it on the hearing.

As to the effect to be given to matters set up in the answer by way of avoidance, there has been some conflict of authority. In New York, South Carolina and New Jersey, the doctrine is well settled that matter of avoidance set out in the answer responsive to the allegations in the bill, are to be considered as equivalent to an affidavit on a motion for injunction. In Maryland and Georgia, a contrary doctrine obtains. In the former State (3 Bland Ch. R. 162), while enforcing their view of the rule, the court did so upon a single authority in Bardiston's Ch. Reports, one hundred and thirty years old; and the Maryland court say, "that the rule was not mentioned in any English digest, compilation, or book, other than that book."

The court in Georgia (1 Kelly, 7), relied solely for their construction on the case of *Hart* v. *Ten Eyck* (2 Johns. Ch. 63). But the decision in this case has been repeatedly reversed in New York.

As to the effect of the answer, then, in this case, the court considers that, on this motion, the denials made in it on personal knowledge, direct and responsive to the bill, are to receive the consideration due to them as if it was on the hearing, but that matters set up by way of avoidance are to be received as affidavits.

As this question was raised at the bar, it is deemed proper to dispose of it, were it only to settle the practice of this court in view of the conflict of authority which exists.

The next subject of inquiry is the objection made to the jurisdiction of the court, by reason of the subject-matter. It is

urged that its jurisdiction is special and limited, and does not extend its aid in an auxiliary proceeding to a court not governed by the principles of the common law. That this proceeding is auxiliary, and not the exercise of original jurisdiction, and is dependent upon that now exercised by the District Court under the act of 1851. That the suit must be depending in a common-law court, and between the same parties; and the case of *Clarke* v. *Mathewson* (12 Peters, 164), and that of *Dunlap* v. *Stetson* (4 Mason, 349), are cited to sustain these propositions. These cases were decided upon the question of jurisdiction as to the want of parties. Nothing was before the court as to jurisdiction as to the subject-matter. It had been decided by Judge Story, (2 Sumner, 262, 268), that a bill of revivor, being a suit between the citizens of the same State, the court had no jurisdiction. On appeal to the Supreme Court (in 12 Peters, 164), they reversed the decision of the court below; and all that was decided was that a bill of revivor was not an original bill, but a mere continuation of it, and if the plaintiff in the original suit was competent to sue in the Circuit Court, his administrator, though a citizen of the same State with defendant, might revive the suit, the two bills being considered one and the same case.

The case cited from 4 Mason, 360, related also to the jurisdiction as to parties, the point being whether the suit could be sustained, the defendant being a citizen of Massachusetts, and not resident in Maine, and the subpena having been served upon him in Massachusetts; and the decision was, that injunction would be issued by the court to enjoin a judgment obtained in the same court, although the original plaintiff is a citizen of another State, and this upon the ground that the injunction bill was part of the original bill. The court cannot consider that these cases, which were decided on the question of jurisdiction

under sec. 11 of the judiciary act, have any bearing on the jurisdiction as to subject-matter. They decide that an injunction-bill is part of the original bill it seeks to enjoin, and that in the issue of it the court is not in the exercise of original jurisdiction; and they predicate the same decree of a bill of revivor. But what is the jurisdiction of this court as to the subject-matter, they do not establish. This must be done by reference to the constitution, acts of congress, and the judicial construction they have received.

There is no doubt that the jurisdiction of the Circuit Courts of the United States is limited to certain persons and subjects, but within those limits is the same in every State, and complete and full.

The constitution provides (art. 3, sec. 2), that the judicial power shall extend to all cases in law or equity specified therein, among which are enumerated "Controversies to which the United States shall be a party." The judiciary act of 1789, (1 U. S. Statutes, 78), enacts, that the Circuit Courts shall have original cognizance with the courts of the several States, of all suits at common law and in equity, where the matter in dispute exceeds the sum of five hundred dollars, and the United States are plaintiffs or petitioners.

By the act organizing this court (10 U. S. Statutes, 631), it is declared, that the court organized thereby, "shall in all things have and exercise the same jurisdiction as is vested in the Circuit Courts of the United States, as organized under existing laws."

The *jurisdiction* of the Circuit Courts of the United States, is thus summed up by the Supreme Court in *The State of Pennsylvania* v. *The Wheeling Bridge Company*, (13 Howard, 563.) "Chancery jurisdiction is conferred on the courts of the United States, with the limitation that suits in equity shall not

be sustained in either of the courts of the United States, in any case where *plain*, *adequate*, and *complete* remedy may be had at law."

The Supreme Court has placed in several cases a judicial construction upon these words. In *Boyce* v. *Grundy* (3 Peters, 210), they say, that the words "plain, adequate, and complete" were *declaratory*, making no alteration in the rules as to equitable remedies. In *Robinson* v. *Campbell* (3 Wheaton, 212), that to determine the signification of these words, resort must be had to the principles of the common law of England, and not to the laws of the State where the court sits; and that if the State law has given a legal remedy for an equitable right, the jurisdiction of the Circuit Court is not affected; and that to *bar* a suit in equity, the remedy at law must be as efficient to the ends of justice and its *complete* and *prompt* administration, as the remedy in equity. (3 Peters, 210.)

It is difficult to see how, under the constitution, the judiciary act, and the judicial constructions given, it can be successfully urged that the Circuit Courts within the limits prescribed as to persons and subjects, have not a complete and full equity jurisdiction.

In this case the court has jurisdiction as to parties, because the United States are plaintiffs. They have jurisdiction of the subject-matter because it exceeds the amount in value prescribed by law, and because there is no "plain, adequate, and complete remedy" for the injury complained of. Whether in affording the relief, they exercise original or auxiliary jurisdiction, has nothing to do with the question, unless an inquiry should arise where a party whose citizenship does not entitle him to invoke the original jurisdiction of the federal courts attempts to do so. The jurisdiction of the Circuit Courts of the United States has been defined by the Supreme Court.

In the *State of Pennsylvania* v. *The Wheeling Bridge* (13 Howard, 563), the Supreme Court say, "The rules of the High Court of Chancery have been adopted by the courts of the United States, and there is no other limitation to the exercise of a chancery jurisdiction by these courts, except the value of the matter in controversy, the residence or character of the parties, or a claim which arises under a law of the United States. In exercising this jurisdiction, the courts of the Union are not limited by the chancery system adopted by any State, and they exercise their functions in a State where no court of chancery has been established. The usage of the High Court of Chancery in England, whenever the jurisdiction is exercised, governs the proceedings. This may be said to be the common law of the country, and since the organization of the government, has been observed. Under this system, where relief can be given, similar relief may be given by the courts of the Union."

We cannot, therefore consider the objection to the jurisdiction of this court as to the subject-matter available. In granting the relief prayed for, it has all the powers of the English Chancery.

We have seen that within the limits of their jurisdiction as to persons and subject-matter, the only restriction upon their equity powers is, that there be no plain or adequate remedy at law.

Have the plaintiffs such complete remedy at law as should bar this suit? The rule is, that the party may come into equity, although he has a remedy at law: if such remedy be not plain, complete and adequate, *a fortiori*, if he has no remedy at law, he is entitled to the aid of a court of equity. The protection of the mine is the object contemplated by this bill; the preservation of its substance, until the title to it is ascertained by the tribunals to which the question is exclusively

confided, is the prayer of the bill. That tribunal has no jurisdiction as to waste or destructive trespass. The title is the only question left to their decision. They have no power to save the property from destruction; and if this court possess none, complainants are without remedy. The administration of justice can neither be "complete nor prompt."

Stress has been placed upon the fact that previously to the institution of this bill, no action at common law has been instituted by complainants. It is urged that such step was necessarily preliminary to the filing of this bill, and the very form of the action is prescribed. Now in the ordinary course of things, where one claims title to real estate, his first step ordinarily is to enforce his claim in one of the ordinary courts of justice, in the form of an action of trespass to try title, or one of ejectment. The limited jurisdiction of a court of law may render it necessary that he should have the interposition of a court of equity to obtain a discovery in aid of his common-law suit; or he may have a defense equitable in character, of which he could not avail himself in a court of law; or the plaintiff may be attempting to avail himself of a legal title inequitably; and in many other instances it may be necessary to invoke the jurisdiction of equity. The fact that a party has not taken this usual step is matter of suspicion, and clearly shows, where no reasons exist for the omission, the want of that diligence the law requires from parties in the pursuit of their alleged rights. Hence, we find frequent allusions in the cases to the fact whether the party has instituted his action at law before he came into equity; and in a certain class of cases, the courts have refused to interfere when an action at law has not been brought. The rule is, however, by no means universal. That the institution of an action at common law is an *indispensable* pre-requisite in all cases to the institution of a

bill for an injunction, cannot be admitted. No case has been cited which has made the omission of a party to have previously instituted a suit at law, the sole ground for refusing an injunction, where fraud was alleged and irreparable mischief the injury sought to be remedied. But the reasons for the ordinary rule do not exist in this case; and the maxim "*Cessante ratione cessat et ipsa lex*," must apply.

There *is* a pending litigation between complainants and Andres Castillero, under whom defendants claim, and in whose name they are, in their own behalf and that of their associates in interest, now prosecuting the title to the premises in dispute. To protect the substance of that property pending that litigation, is the object of this bill. The objection is, that such litigation must be pending in a particular form, and in a court of common law. We do not consider this proposition correct, and the cases where the Courts of Chancery in England have interposed to protect property in litigation in the Ecclesiastical Courts, disaffirm that doctrine. To these we shall hereafter refer. For the present we will inquire whether, under the peculiar circumstances of this case, the omission of the complainants to have instituted an action in a court of common law to try title, is sufficient to defeat the present application. It is true, the United States hold a legal title to the premises. Suppose that, counting upon that title, they had sued for the recovery of the possession, might not the defendants in that suit have pleaded to the action the act of congress passed 3d March, 1851, entitled an "Act to ascertain and settle the private land-claims in the State of California," and their proceedings under it pending in the District Court?

By that act the United States are bound to hold their title subservient to the adjudication of special tribunals, with rules of decision very different from those which obtain in the ordi-

nary tribunals of the country. An attempt on the part of the United States, so long as that act is unrepealed, to avail of their legal title in a court of common law, would have been inequitable and unjust. They have made no such attempt. They do not propose to do so, by this bill, further than as they allege it is necessary, in order to preserve the property until the question of title is determined as provided for by law. The fact that they have made their title dependent upon the action of special tribunals, and thus have deprived themselves of the right to enforce it at common law, cannot bar them from enforcing their equitable right to prevent the destruction of the property, on the ground that they had not previously to their application brought an action at common law to enforce that title.

Another objection to the relief prayed for is, that an injunction cannot be granted to enjoin a trespass where the title is disputed.

In a case of mere trespass, or a technical waste where the mischief is not imminent, where no equitable circumstances appear, and no fraud alleged, and where the title of plaintiff is disputed in the manner prescribed by law, the rule is correctly stated.

Where the mischief sought to be protected against is irreparable and imminent; where the bill alleges fraud and antedating in the execution of the title-papers set up by the defendants, and their genuineness is affirmed only on information and belief,—the case does not exist, to the knowledge of this court, where the rule contended for is to be literally applied. No one of the cases cited by the solicitor for defendants reaches this case. The authorities are numerous. To comment upon them in detail would be an unconscionable consumption of time.

The strongest case cited from the English authorities is that of *Pillsworth* v. *Hopton* (6 Vesey, 51); and from the American, those of *Storm* v. *Mann* (4 Johns. Ch. 21) and *Perry* v. *Parker* (1 Woodbury & Minot, 281).

In the former case, the lord chancellor said, "I do not recollect that the court ever granted an injunction under any such circumstances." The character of the waste is not mentioned; and his Lordship concluded by saying, "I remember perfectly, being told from the bench very early in my life, that if the plaintiff filed a bill for an account, and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court." Now, this parol authority which his Lordship applied to that case, decided in 1801, must have carried back his memory to about the middle of the eighteenth century. In 1837, nearly a century afterwards, Judge Story says, "Indeed, there are numerous cases which show the gradual meliorations or changes, often silent and almost unperceived, which have been introduced into the practice of the courts of equity, to obviate the inconveniences which experience has demonstrated, and to adapt the remedial justice of these courts to the new exigencies of society." The learned jurist adverts to an instance by way of illustration; and, in a subsequent part of his opinion, alludes to the qualification of the doctrine which existed, that affidavits could not be read in support of the title of the plaintiff, which is contradicted by the answer. "I cannot well see," said he, "why the court, to prevent irreparable mischief, may not look to affidavits in affirmance of the plaintiff's title, not so much with a view to establish that title, but to see whether it has such probable foundation in the present stage of the cause, as to entitle the plaintiff to be protected against irreparable mischief, if upon the hearing it should turn out to be well founded." Judge Story has alluded to the proposition

laid down by the chancellor in the case of *Pillsworth* v. *Hopton*, and says, "The interference of courts of equity in restraint of waste may have been originally confined to cases founded in privity of title; and for the plaintiff to state a case in which the defendant pretended that the plaintiff was not entitled to the estate, or in which the defendant was asserted to claim under the adverse right, was said to be for the plaintiff to state himself out of court. But at present the courts have by insensible degrees enlarged the jurisdiction to reach cases of adverse claims and rights not founded on privity, as for instance, to cases of trespass with irreparable mischief." (Story's Equity Jurisprudence, § 918.)

In *Pillsworth* v. *Hopton*, it is also to be observed that the plaintiff had failed in an ejectment suit he had brought; and further, there was no equitable circumstance calling for the interposition of a court of equity.

In the second case, that of *Storm* v. *Mann* (4 Johns. Ch. 21), decided in 1819, cited to sustain the general proposition as to dispute of title, the defendant had been for a long time, and was at the time, in possession; the nature of the waste is not stated, and no special ground was taken for equitable relief, nor any explanation made for the delay. The principle asserted in this case is, that a court of equity will not interfere where rights are properly determinable in a court of law where an adequate remedy can be found. In this case, the court referred to the case of *Pillsworth* v. *Hopton*, above referred to, as an authority for saying, "If the plaintiff in his bill states an adverse claim in the defendant, he states himself out of court." We have seen the views of Judge Story on this point; and it is extraordinary that the principle ever should have been asserted in any case in such general terms, that a party setting forth an adverse claim in the bill states himself out of court.

There are few cases which can be imagined where one enters upon land and exercises acts of ownership, that he cannot be said in common parlance to dispute the title of the owner so soon as he is known to him. We shall see, by reference to authority, that no such principle now exists.

The last American case cited, is that of *Perry* v. *Parker* (1 Woodbury & Minot, 281). The bill in this case was to enjoin the cutting of the dam and gates of the complainant; and Mr. Justice Woodbury, after noticing the cases in which injunction has been refused on the ground of the right being disputed, says, "Some cases of necessity, where the danger is great and the injury irreparable, may in England be regarded as exceptions;" and he refers to several cases decided in the high court of chancery. It is to be observed that in this case there was no fraud alleged, no irreparable mischief suggested, nor other equitable circumstances. The judge, in the absence of them, refused the injunction. But he states, after alluding to the exceptions in England, his own convictions as to the law. "And I am inclined to hold," he said, "that a mere denial of title is never sufficient, as such denial may be made for delay and mischief, unless as before remarked it is accompanied by circumstances showing it to be in good faith." If a denial unaccompanied by other circumstances is never sufficient, it seems that a denial on mere "information and belief" as in this case, of the charges of fraud, forgery, and antedating made against the documentary title of defendants, would be insufficient. A careful examination of all the authorities cited by defendant only show, in the opinion of the court, that in the case of common trespass, in the absence of equitable circumstances, an injunction will not issue if the title of plaintiff is disputed; that the pendency of a suit is not of itself a ground for the interference of a court of equity; that a party may by laches,

or delay unaccounted for, or by an omission to bring an action at law, there being no reason for the omission, deprive himself of the right to the interposition of a court of equity.

There is no one of those cases which assert that a party by simply disputing plaintiff's title can defeat his application, in a case resembling the present.

The true rule will be found by referring to the English and American authorities.

That decisions directly in point, on either side, are to be found to every part of this case, is not to be expected. It is novel in some of its features. But a new case does not create necessarily a new principle. C. J. Marshall, in *Osborn* v. *Bank United States* (9 Wheaton, 841), stated, "The appellants admit that injunctions are often awarded for the protection of parties in the enjoyment of a franchise; but deny that one has ever been granted in such a case as this. But, although the precise case may never have occurred, if the same principle applies the same remedy ought to be afforded."

Principles have been enunciated both in England and this country, the application of which will dissipate all difficulty arising from the novelty of this case.

Lord Redesdale, than whom there is no higher authority, and of whom the court say, in *Bogardus* v. *Trinity Church* (4 Paige's Ch. 195), "His opinion upon a case of equity pleadings is always esteemed the highest authority," and in England where his treatise is received by the whole profession, "as an authoritative standard and guide," is clear and full upon this point.

This author, in enumerating the general objects of the jurisdiction of a court of equity, includes the following: 1. Where the principles of law by which the ordinary courts are guided, give a right, but the powers of those courts are

not sufficient to afford a complete remedy, or their modes of proceeding are inadequate to the purpose. 2. Where the principles of law by which the ordinary courts are guided, give no right, but, upon the principles of universal justice, the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent. 3. To provide for the safety of property in dispute pending a litigation, and to preserve property in danger of being dissipated or destroyed by those to whose care it is by law entrusted, or by persons having immediate but partial interests. (Mitford's Ch. Pl. 111.)

Again, he lays down the rule that, "pending a litigation, the property in dispute is often in danger of being lost or injured, and in such cases a court of equity will interfere to preserve it, if the powers of the court in which the litigation is depending are insufficient for the purpose."

Thus, during a suit in an ecclesiastical court, for administration of the effects of a person dead, a court of equity will entertain a suit for the mere preservation of the property of the deceased till the litigation is determined, although the ecclesiastical court, by granting an administration *pendente lite*, will provide for the collection of the effects. (*Ibid.* 158.)

In Daniel's Ch. Practice, it is stated, that "an injunction will be granted in some cases where the parties have both legal titles and legal remedies, but irreparable mischief would be done unless they were entitled to more immediate relief than that which they could obtain at law; it has accordingly been granted, when the injunction amounted in fact to an injunction to stop a trespass; for if the court would not interfere against a trespasser, he might go on by repeated acts of damage which would be absolutely irremediable."

The author refers to *Flamang's Case*, in which Lord Thur-

low refused to enjoin a mere trespass ; but subsequently changed his opinion, on the ground that irreparable mischief would follow his refusal; holding, in effect, that if the defendant was using the substance of the thing, the liberty of bringing an action was not the only remedy to which in equity he was entitled; and the author concludes: "The same principle has been acted on and applied without scruple, in various other decisions; for unless there was a jurisdiction to prevent destruction or irreparable mischief, there would be a great want of justice in the country." (3 Daniel's Ch. P. 1854.)

The foregoing are the expositions of the general doctrine by two standard text-writers; and they presuppose that the property sought to be protected was in dispute.

In *Poor* v. *Carleton*, Mr. Story does not confine himself to the question of title as raised upon the pleadings, but is of opinion that affidavits as to title ought, on general principles, to be permitted to be read. Whence the necessity, in any case, of reading affidavits as to title of plaintiff, unless upon the ground that such title has been disputed ?

The authorities which exclude affidavits to title do not do so upon the ground that defendant has disputed the title of plaintiff, but because the court has no jurisdiction to establish title between the parties.

In *The United States* v. *Gear* (3 Howard, 120), the defendant had been sued in two actions, at law and in equity, and they involved his right to a tract of land upon which there was a lead mine. The first was an action of trespass, and the second a bill in chancery to stay waste, on the equity side. The defendant by his pleas to the common-law suit, raised the question of title. The same question was raised in the equity cause. Both cases were carried up, on a division of opinion

between the judges, to the Supreme Court. Among other questions raised in the equity cause, was the right of complainant to an injunction; which was granted.

In *Kensler* v. *Clark* (1 Rich. 617), a bill was filed for an injunction to restrain from waste or cutting timber. The defendant insisted in his answer that he had a perfect title to the premises, and set it out. The chancellor, in his decree, discussed the question of right, and decided in plaintiff's favor, and ordered an injunction to issue. On an appeal (Chancellors Johnson, Harper, and De Saussure, justices), the court declined to decree on the question of title, but sustained that portion of the chancellor's opinion which went to the issue of an injunction.

"The claim," said Chancellor De Saussure, "of both parties to the title was set forth in the pleadings; and the chancellor on the circuit, to put an end to litigation and the multiplicity of suits, made a decree on the question of right.

"But, as this court is unwilling to decide on the question of title, which is pending in a suit at law, it will make no decree on the appeal on that ground, but will leave the parties to the litigation of the title to the court of law, to which the court remits them." The court confined itself to the appeal from the decree of the chancellor granting an injunction. The appeal was made on the ground, that in a case of trespass no injunction ought to be granted. Neither the chancellor below nor the appellate tribunal considered, that the right of complainant to an injunction was defeated by defendant disputing the title, and setting up in his answer an adverse one. The Court of Appeals say (De Saussure delivering the opinion), "On a careful examination, I concur entirely with him, in directing an injunction to be issued in this case. He has placed the interposition of the court for the protection of the land in ques-

tion from irreparable mischief, on the true grounds; and I entirely concur with him. Nor is this doctrine and practice new in England or in this country."

The court cannot believe, in view of the foregoing authorities, that no injunction can in any case be granted where the title is disputed, in a case of trespass of the character complained of in this case.

Thus far the attention of the court has been limited to the objections urged by defendant's solicitors to the jurisdiction of the court and the mode of procedure. The remaining question is one raised by one of the grounds of defense taken, viz. that the defendants are protected by the answer.

This is a substantial defense. It is the ordinary question which arises on a motion for an injunction, or to dissolve an injunction (if previously granted), on bill and answer. A decision of it covers the whole merits of this motion.

When an answer denies directly and positively from personal knowledge the material allegations of the bill, it "denies the equity of the bill," and the court is bound to consider it as evidence to which entire credit is to be given, until disproved by two witnesses, or one with stringent corroborative circumstances. Acting upon it as such, the court, in the absence of extraordinary circumstances, will dissolve the injunction if previously granted. If, on the contrary, such denials are not or cannot be made, they will consider that the allegations of the bill have not been disproved. The rule on this point, with its qualifications, will appear by reference to the authorities.

The general rule is, that an injunction is to be dissolved when an answer comes in and denies all the equity of the bill. This is the rule in ordinary cases; but, to use the words of Lord Eldon in *Clapham* v. *White* (8 Vesey, 36), there are "excepted

cases;" such are, mismanagement of partnership concerns, cases of waste or destructive trespasses, patent cases, and cases of irreparable mischief. But even in those cases to which the general rule applies, the answer, to have the effect of dissolving the injunction or preventing its issue, must be specific and positive.

In *Poor* v. *Carleton* (3 Sumner, 77), Judge Story says, "But supposing the doctrine [which he by no means admits] were as comprehensive as to the dissolving an injunction on the coming in of the answer as the counsel has contended for, the question occurs whether it is applicable to all kinds of answers which deny the whole merits of the bill, or whether it is applicable to such answers only as contain statements and denials by defendants connusant of the facts, and denying the allegations upon their own personal knowledge. It seems to me very clear, upon principle, that it applies to the latter only."

"The ground of the practice of dissolving an injunction upon a full denial, by the answer, of the material facts is, that in such a case the court gives entire credit to the answer, upon the common rule in equity that it is to prevail, if responsive to the bill, until it is overcome by the testimony of two witnesses, or of one and other stringent corroborative circumstances. But it would certainly be an evasion of the principle of the rule, if we were to say that a mere naked denial, by a party who had no personal knowledge of any of the material facts, were to receive the same credit as if the denial were by a party possessing actual knowledge of them."

"In the latter case the conscience of the defendant is not at all sifted, and his denial must be founded upon his ignorance of the facts, and merely to put them in a train for contestation and due proof to be made by the other side." The learned

judge proceeds, "What sort of evidence can that be, which consists in the mere negation of knowledge by the party appealed to? Such negation affords no presumption against the plaintiff's claims; but merely establishes that the defendant has no personal knowledge to aid it, or disprove it. It is upon this ground that it has been held, and in my judgment very properly held, that if the answer does not positively deny the material facts, or the denial is merely from information and belief, it furnishes no ground for an application to dissolve a special injunction." (3 Sumner, 78.)

Judge Story has thus compendiously embodied the doctrine and the reason for its existence. His remarks were made on a motion for the dissolution of an injunction *after* answer. They apply to the present motion for an injunction *after* answer; for surely, if an answer does not so deny the material allegations of the bill as will authorize the *dissolution* of an injunction, such answer will not prevent the *issue* of one in a proper case.

In *Clark's Ex.* v. *Riemsdyk* (9 Cranch, 160), the court say, "If a defendant asserts a fact (in his answer) which is not and cannot be within his own knowledge, the nature of his testimony cannot be changed by the positiveness of his assertion. The strength of his belief may have betrayed him into a mode of expression of which he was not fully apprised. When he intended to utter only a strong conviction of the existence of a particular fact, or what he deemed an infallible deduction from the facts which were known to him, he may assert that belief or that deduction in terms which convey the idea of his knowing the fact itself. Thus, when the executors say, that John Innes Clark never gave Benjamin Munro authority to take up money or to draw bills; when they assert that Riemsdyk, who was in Batavia, did not take this bill on

the credit of the owners of the Patterson, but on the sole credit of Benjamin Munro, they assert facts which cannot be within their own knowledge. In the first instance, they speak from *belief;* in the last, they swear to a *deduction* which they make from the admitted fact that Munro could show no written authority. "These traits in the character of the testimony must be perceived by the court, and must be allowed their due weight, whether the evidence be given in the form of an answer or deposition. The respondents could found their assertions only on belief: they ought so to have expressed themselves; and their having, perhaps incautiously, used terms indicating a knowledge of what, in the nature of things, they could not know, cannot give to their answer more effect than it would have been entitled to had they been more circumspect in their language."

A practical illustration of this doctrine, as applicable to an affidavit on a motion for injunction, is to be found in the case of *Davis* v. *Leo* (6 Vesey, 785), in which Lord Eldon says—"There is no positive affidavit in this case that the will was made, under which the plaintiff is next tenant for life, to the defendant Leo. This is a mere hypothetical title, upon the plaintiff's *information* and *belief* that a settlement was executed." It is to be borne in mind, that the grounds of defendant's information and belief were set forth and his belief sworn to. His Lordship, however, proceeded and said—"There is no instance of an injunction in such a case. An affidavit to *information* and *belief* is nothing in this sort of case."

In *Everly* v. *Rice* (3 Green Ch. R., 553), the chancellor says, referring to the answer in that case—"In common charity it is to be presumed, that this general denial relates to

a written agreement or deed which is not alleged in the bill, or else that it is predicated of the defendant's *information* and *belief*, which is not sufficient. The defendant must answer upon his *own knowledge*, and not upon *information* and *belief*, otherwise the injunction must be retained till the final hearing."

Nor is this well-settled principle affected by the inability of a defendant to make a fuller denial; for the reasons given for the existence of it are unaffected by the inability of a defendant to make a fuller denial; and for the simple reason, that the existence of the fact alleged by complainant is unaffected by the ignorance of the defendant of its existence or the sincerity of his belief in its non-existence.

In *Roberts* v. *Anderson* (2 Johns. Ch. 202), the bill prayed for an injunction staying all proceedings on a judgment in ejectment which had been obtained against the complainant. Chancellor Kent stated, "The only point is, whether the two deeds from Griffith to Sarah Johnson, under whom the defendants set up title, were fraudulent and void. The question of fraud was not tried; and from the history of the ejectment suit, as stated in the pleadings, it would seem that it could not be tried, as the recovery was placed entirely on the ground that the defendant at law was tenant to the new defendants, and so concluded from setting up this defense. But the fraud as charged, is a proper and familiar head of equity jurisdiction, and unless the answer be full and satisfactory, the injunction, if right in the first instance, ought to be retained until the hearing. All the denial contained in the answer is, that the defendants were not privy to any fraud, and were bona-fide purchasers, under a judgment and execution against Sarah Johnson. If she had no title, they had none, and they aver

that they *believe* her title was good, because they do not know or *believe* that the conveyances from Griffith to her were fraudulent. This is leaving the question of fraud as unsettled as before the answer came in.

"It is true, the defendants may have given all the denial in their power; but the fraud may exist notwithstanding, and consistently with their ignorance of the sincerity of their belief. In some particular cases, the court will continue an injunction though the defendant has *fully* answered the equity set up."

In the case of *Everley* v. *Rice*, the following is cited from the language of Chancellor Williamson, in the case of *Kinnerman* v. *Henry*. "I do not consider," said he, "the fraud in this case as sufficiently denied to entitle the defendants to a dissolution of the injunction upon the ground of the whole equity of the bill being denied. The defendants are not charged with being parties or privy to the fraud;" nor were they so. In relation to them the chancellor says, "All they could do, or which they have done, is to deny all *knowledge* or *belief* of the alleged fraud. The answer may be perfectly true, and yet Johnson, the mortgagor, guilty of the fraud imputed to him, and the complainant entitled to relief against these defendants. Such *an answer is not sufficient denial of the complainant's equity to entitle the defendants to a dissolution of the injunction.*"

We will now submit to the principles enunciated in the foregoing authorities, the denials of the answer in this case. One allegation in the bill, and one of the most material, is direct and positive. It enumerates sundry documents constituting a part of the documentary title of defendants, and expressly charges, that all and singular said documents in relation to said Castillero's claim to said tract of land and cinnabar mine are *false*, *fraudulent*, *ante-dated* and *forged*, and they

have all and singular been fraudulently contrived and fabricated since the right of property and possession to the said land and mine accrued to complainants, with intent to cheat and defraud the United States out of the property and possession of said land and mine.

The denial of the defendants as to the forgery of the documents is to be found in section fourteenth of the answer. They say, that they have no personal knowledge of anything said or done by the said Castillero in or about his said representations to the Alcalde Pico, as shown in his letters, copies of which are exhibited in exhibits "A" and "B;" neither have they any personal knowledge of what was said or done by the said alcalde, when he gave the said Castillero possession of the mine and lands around it, which was evidenced by the written instrument, a copy of which is exhibited, marked "Exhibit E;" nor have they any personal knowledge of what was said or done by Castillero, or the Mexican authorities, in and about the business which resulted in the proposals, contracts, grants, and official correspondence and reports which appear and are shown in the exhibits annexed to this answer, being "Exhibits G, H, J, K, L, M, N;" but they have been *informed* and *believe* that the said documents are perfectly genuine and fair, and express truly the matters and things to which they relate, and were made at the times of their respective dates.

Having stated their want of personal knowledge of the facts covered by said documents, in the fifteenth section of the answer, the defendants aver that, to the best of their knowledge, information, and belief, Castillero did present to said Alcalde Pico the two original letters, copies of which are hereto annexed, marked "Exhibit A and B," and that said letters were written on their respective dates; and said Pico did put the said Castillero in possession of the mine and of

three thousand varas of land in all directions measured from the mouth of the said mine, in the month of December, 1845, and that all the matters of fact recited and described in the said instrument signed by Pico, Alcalde, and by Antonio Suñol and José Noriega, attesting witnesses, a copy of which is shown in "Exhibit E," are truly recited therein; and in the same section, the defendants Halleck and Barron say, and the defendants Parrott, Bolton, and Young, believe it to be true, that they (the said Halleck and Barron), have conversed with the said Pico, the alcalde, with the said Antonio Suñol, and with José Fernandez, who, in the month of December, 1845, was a clerk in the office of Pico, Alcalde, who was present on the ground at the old mouth of the mine when the said possession was given, and also with other persons who lived in and about the pueblo of San José in 1845 and 1846, and who knew of the possession of said mine by Castillero as a matter of general notoriety; and from all the knowledge and information obtained from these and other various and authentic sources, which information was positive and precise, the defendants are convinced and believe that the possession of the mine, and of three thousand varas of land measured in all directions from the then mouth of the mine, was given by the said Alcalde Pico to the said Castillero, in the month of December, A. D. 1845, as set forth in "Exhibit E." And this section concludes with the averment that to "the best of their knowledge, information, and belief," all the acts and things which are described and mentioned in the original documents, of which the "Exhibits G, H, I, K, L, M, N," and "O," are copies, did really take place, as they are therein set forth, and at the times therein specified, and that all the said documents are genuine, and were made at the times shown in their respective dates.

In the sixteenth section of the answer, William E. Barron avers, and the defendants, Halleck, Young, Parrott, and Bolton, believe it to be true, that in the month of May, in the present year, he (the said William E. Barron), was *informed* by Segura, that he, Segura, was in 1846 President of the "Junta de Fomento," that his signature to the various "Exhibits," when shown to him, were genuine, and also declared that all the titles were signed by the persons who purport to sign them, and received by him; and a detailed statement by him is made of the facts connected with the acts of the said Segura in connection with the title of Castillero.

In the seventeenth section of the answer a similar course is pursued, the difference being in the character of the facts communicated to Mr. Barron, and his informant on this occasion being Manuel Conto, Secretary of "El Fondo de Mineria."

In the eighteenth section of the answer a similar statement is made; the only difference being in the character of the facts narrated; being detailed by a different person, Jose Maria Duran, who stated he was chief clerk of the ministry of justice, under Becerra.

In the nineteenth section of the answer, similar statements of facts are made upon the information of Castillo Lanzas, who was a Mexican official in 1846.

In the twentieth section, the information was received by Mr. Barron from one Blas Balcarcel, who in 1846 was prefect of the National College of Mining in Mexico.

In the twenty-first section of the answer, it is averred that Barron while he was in Mexico inquired in the various offices of the government, and found many persons who remembered when Castillero was in Mexico in 1846, and that it was *reported* and *believed* that he discovered a quicksilver mine in California,

and that he was then engaged in making some contract with government in relation to the same; and from all the said Barron could learn, he is perfectly convinced that all the matters and things spoken of in the documents copies of which appear in the said Exhibits G, H, I, K, L, M, and N, are truly related in said documents, and that all the said documents are genuine and were made at the time they purport by their dates to have been made.

In the twentieth section of the answer, all the defendants unite in the averment that they *believe* in the entire truth of all the *information* received as aforesaid by the said Barron, and from all said *information*, and from other sources of *information*, that all the matters and things spoken of in the documents copies of which appear in the said Exhibits G, H, I, K, L, M, and N, are truly related in said documents, and that all the said documents are genuine, and were made as they purport to have been made by their dates.

The last section which alludes to that part of the bill which charges forgery and ante-dating, is the twenty-third; which denies generally the charges, and particularly denies that any of the documents copies of which are shown in the Exhibits A, B, E, G, H, I, K, L, M, N, and O, are false, or fraudulent, or ante-dated, or forged, &c.

Most of that portion of the answer which responds to the allegations of forgery and ante-dating of the muniments of defendant's title, is given literally, and all substantially set out. It is matter elaborate and argumentative; but does not constitute positive and distinct denials, which the law requires in an answer in response to the material allegations in a bill, in order to influence the action of the court on a motion for an injunction in a case of irreparable mischief, or destructive trespass. The insertion in an answer of such denials merely,

in the language of Judge Story, puts them in a train for contestation and proof by the other side. (3 Sumner, 77).

The averment of the genuineness of the documents alleged by the bill to be forged and ante-dated, is founded entirely on "*information and belief*," and on deductions from facts of which defendants were informed. In the fourteenth section of the answer they say, they have no personal knowledge of anything said or done by Castillero in his representations to the Alcalde Pico, as shown in his letters; that they have no personal knowledge of what was said or done by the alcalde when he gave the possession of said mine to Castillero, evidenced by "Exhibit E;" nor any personal knowledge of what was said or done by Castillero or the Mexican authorities about the business which resulted in the documents, grants, &c., which are shown in the "Exhibits G, H, I, K, L, M, N;" but, they say, they have been *informed* and *believe* that said documents are perfectly genuine and express truly the matters and things to which they relate. The allegation in the bill is positive, and charges that these very documents, or rather their supposed originals, were fraudulent, forged, and antedated.

The denial is, that the defendants have no personal knowledge of the facts exhibited in the documents, but they have been *informed* and they *believe* the documents to be perfectly genuine, express truly the matters and things which they relate, and that they were made at the times of their respective dates. Can such denial be deemed clear, direct, and positive? They do not pretend to have seen the originals; they disavow all personal knowledge of the facts to which they relate. Their belief as to the genuineness of the documents, is founded on the information they received that they were genuine; and upon the authenticity of that information they found their

belief of the genuineness of the facts of which they relate, of which themselves are in no other way connusant.

Every word they have uttered may be strictly true. Their belief may be sincere, they undoubtedly may have received such information, and yet the documents may have been fabricated as alleged, without imputation of false swearing. Hence the well-settled rule that the denial in an answer must be direct and founded on personal knowledge before the court can act upon them in a case of irreparable mischief, and the issue of an injunction to enjoin the same.

It is due to the defendants in this case to say, they have frankly disclosed the sources of their belief and sworn only to it. They have not placed themselves in the position of parties described by C. J. Marshall in *Clark's Ex.* v. *Reimsdyk*, (9 Cranch, 160.) The strength of their belief has not betrayed them into a mode of expression of which they were not apapprised. That when they intended to utter only a strong conviction of the existence of a particular fact, or what they deemed an infallible deduction from the facts known to them, they may assert that fact or that deduction in terms which convey the idea of their knowing the fact itself. In this case, the defendants tell us, they have no personal knowledge of the transactions; that they were informed the documents were genuine, and acting on that information, they swear to their belief of the existence of the facts to which they relate.

It may be urged, they could not truly make a fuller answer in the nature of things. This is true; and if the question was, whether such denials be sufficient to raise the issues for trial on the final hearing, and impose upon the complainants the duty of meeting them by proof, there could be no doubt that the pleading would be sufficient for that purpose. That defendants are unable to answer more fully, is not their fault; but the

rights of complainants cannot be prejudiced, for it certainly is not their fault. The defendants are in the precise position of all other parties who are called on in a case like the present, to answer an alleged simulation of the title by those under whom they claim. Chancellor Kent only affirms the well-settled doctrine, when he says "It is true, the defendants may have given all the denial in their power; but the fraud may exist notwithstanding, and consistently with their ignorance, or the sincerity of their belief." (*Roberts* v. *Anderson*, 2 Johns. Ch. 202.)

In ascertaining the sufficiency of the denials in the answer, it is necessary to refer to some other allegations in the bill. The twenty-eighth article of the bill charges that all the pretended proceedings before the said Alcalde Pico, in respect to the judicial possession of the mine, and all the pretended proceedings of the Government of Mexico, were falsely and fraudulently made, contrived, procured, ante-dated and forged, in pursuance of the aforesaid fraudulent conspiracy against the United States, and with intent to defraud the United States out of said mine and minerals, or some part thereof, under false, forged, and ante-dated Mexican titles. The bill further charges that in pursuance of said conspiracy, letters were written and communications and memorandums made between the said Alexander Forbes and his confederates, and the said J. Alexander Forbes, as their agent (copies of which are herewith filed as exhibits, marked "B, C, D" and "E," and made part of the bill), in and about the fabrication and procuring the aforesaid false, ante-dated and forged Mexican titles, &c. To these charges, they reply in the thirty-second section of the answer, And the defendants admit the correspondence embraced in said exhibits, to have been written by the parties to them, at the times they bear dates respectively, and at the places from

which they purport to be written, except the letter dated 25th March, 1848, which they aver to have been forged. They do not deny that J. Alexander Forbes was acting in behalf of, or as agent of the parties, but they deny "that said letters and communications were written by the said parties with an intent to commit a fraud in furtherance of a conspiracy to fabricate a title, as charged in said bill, except so far as appears from said letters on the part of the said James Alexander Forbes."

They neither deny nor admit such intention on his part; but refer to the correspondence for the ascertainment of the fact, whether or not a person under whom some of the defendants claim title, was guilty of the charges of conspiracy and intention to cheat, as alleged in the bill.

Such denials of material allegations of the bill in the answer, though sufficient for the purpose of pleading, to place the issues raised in a train for contestation, are not sufficient to enable the court to act upon the documents as proved, and to refuse the injunction on that ground.

We have discussed this motion on the allegations of the bill and the denials of the answer, as all affidavits as to title have, in my opinion, been excluded by the well-settled rules of courts of equity, a rule affirmed by this court in the case of *Tobin* v. *Walkinshaw*. Judge Story has, as we have seen, expressed strong doubts of the propriety of the rule, and as an extended discussion has been made by the respective counsel in relation to title, it is deemed proper to look to the facts elicited by the affidavits, and to inquire into the allegations of forgery and ante-dating made against the documentary title set up by defendants, with a view not to decide upon or establish title, a matter within the exclusive jurisdiction of another tribunal, but to ascertain whether the facts and the testimony bearing upon the allegations of fraud, forgery, and ante-dating,

be such as to satisfy the court that there is reasonable foundation for the plaintiff's title, which would entitle them to protection from irreparable mischief, in the event that such title should turn out to be well founded. My associate will give his views upon that point.

The remaining inquiry is, Does the present case come within the range of cases in which courts of equity have exercised the powers now invoked? A response to this question will be found by reference to a few decided cases, in addition to authorities incidentally alluded to while commenting upon the objections urged by the solicitors for defendants.

It is proper to observe, that the court on this motion is not to try title. The determination of that question belongs exclusively to another tribunal. All that we have to do in relation to title is to look to the allegations of the bill and the denials in the answer, and ascertain from them whether the plaintiff's title, in the language of Mr. Justice Story, "has such a probable foundation in the present stage of the cause, as to entitle the plaintiff to be protected against irreparable mischief, if upon the hearing it should turn out to be well founded" (3 Sumner, 77). To this, the court will limit its remarks.

In *Lloyd* v. *Passingham* (16 Vesey, 59), a receiver and injunction were refused where defendant was in possession, but where the legal estate was charged to have been obtained through forged documents. The action of the court did not turn upon a want of power in the court, but upon the special circumstances of the case. The grounds on which the court decided will instruct us as to the principles on which a court of equity acts in cases analogous to the present. In that case, the defendants had recovered, by ejectment, certain estates.

This occurred some fourteen years prior to the suit in equity. The latter was a bill filed to impeach the verdict in ejectment, principally as obtained upon forged entries of burial and death, contrived by Robert Passingham. The bill prayed for an injunction to enjoin the cutting of timber and other waste, and for a receiver. The case was argued on affidavits. Lord Eldon refused the application on three grounds: 1. Because the trial in ejectment had been had upon other testimony than the entries which were alleged to have been forged. 2. Because doubts were thrown upon the affidavits charging the forgery, on account of contradictions as to time and circumstances, which made the act of forgery, if done, a remarkable one; and 3. Because no danger as to the rents was suggested. His Lordship looked to the additional circumstance, that the defendants would be made illegitimate, provided the testimony should bear out the affidavits.

It was under foregoing circumstances, where the defendants held the legal title and a judgment in ejectment obtained by them fourteen years previously, when the judgment had been obtained on other testimony beside the alleged forged documents, where the evidence as to the forgery was contradicted and where there was no irreparable mischief, for *none such was suggested*, that Lord Eldon refused the motion and concluded with these words—"Whatever may be the ultimate event of this suit to which my act this day, refusing this application, will be no prejudice, I do not consider that these circumstances form that extreme case in which the possession is to be taken from those who have the legal title." (16 Vesey, 72.) Nothing is said of want of power in the court; a perfect legal title was in defendants, held under a judgment for fourteen years, accompanied by possession. The judgment was

obtained on other testimony beside the documents alleged to be forged, the testimony as to forgery contradictory; and, above all, irreparable injury not even suggested; and yet his Lordship in deciding against the motion bases his decision to a considerable extent on the last ground,—*that refusing the application will be of no prejudice.*"

In his opinion the chancellor expressly says, "I give no opinion upon the application from injunction to stay waste." This language was used by him in view of the fact, that he did not view the case as one of irreparable mischief.

This case not only establishes the power of the court, but no notice was taken of the fact that there was no suit at law pending at the time.

In the case of *Guerard* v. *Geddes* (1 McCord Ch. 304), no suit at law was pending, and the court in its opinion was discussing the power of a court of equity to interfere by injunction in a case of trespass.

They overruled the decision of the court below ordering an injunction to issue to restrain the defendant from obstructing a right of private way; and they at the same time place the doctrine on its true ground, that of irreparable injury. They consider a temporary, obstruction of a private road, and similar trespasses, as not cognizable in equity.

The decision in this case enunciates the true rule. It is the *irreparable mischief* which is to govern. A party may complain of what may be deemed technically a nuisance or waste; but the true question remains, is the act complained of one of *irreparable mischief*. The court in the above case say, that the nuisance complained of must be productive of irreparable injury (1 McCord Ch. 309.) In reference to trespasses which are not attended by such mischief and an adequate remedy can be obtained at law, they say, such cases do not require the aid of

a court of equity, and certainly not until the right has been determined at law. (*Ibid.*)

Upon the nature and character of the injury complained of, depends to a considerable extent the jurisdiction of this court. Is it irreparable?

Irreparable injury is such as cannot be estimated with accuracy in money, or where it is so great that the party committing it, cannot make a compensation, or where from its nature the injured party cannot be made whole. Such for instance, as the destruction of the substance of the thing.

The property sought to be protected is mineral land, and a mine of great value. The acts which defendants are committing and intend to commit, are such as the law adjudges to be waste. This point is settled by the case of the *United States* v. *Gear* (3 Howard, 120); and also by the Supreme Court of this State.

In the case of the *Merced Mining Company* v. *Fremont* (7 Cal. 321), it is said, "The ground upon which the injunction was granted in these cases of timber, coals, ores, and quarries was, that the trespasser, in the language of Lord Eldon, was 'taking away the very substance of the estate.'"

"It must be conceded that the principles of these cases apply to gold mines as well as to others. In fact, there are circumstances connected with gold mines (and the remarks apply equally to quicksilver mines) that render the remedy by injunction more appropriate than to other mines. The only value of a gold-mining claim, in most cases, consists in the mineral. If a party removes the gold, he removes all that is of any value in the estate itself. It is emphatically taking away the entire substance of the estate."

After affirming the rule, that facts to show that the injury

is irreparable must be stated in the complaint, the court proceeds, "But in the cases of mines, timber, and quarries, the statement of the injury is sufficient. In the nature of the case, all the party could well state as matter of fact, is the destruction of the timber in the one case, and the taking away the minerals in the other. Taking away the minerals is itself the injury that is irreparable; because, it is the taking away the substance of the estate. The allegation of insolvency is not necessary to procure the injunction in these cases. The right to the remedy is based upon the nature of the injury, and not upon the incapacity of the party to respond in damages."

In the opinion of this court, mere insolvency, if the amount is inconsiderable, would not give jurisdiction to a court; but where the amount is great, and the inability to respond is greatly disproportioned to that amount, such insolvency would be an element which would certainly influence the action of a court; and where it exists is a proper subject for an allegation in the bill.

Having disposed of the question relative to the power of the court, and the irreparable character of the injury complained of, we come to the consideration of another point:

Have the complainants such a right in the premises as entitles them to an injunction to protect them until the litigation pending as to their title shall be determined?

That the United States, by the Treaty of Guadalupe Hidalgo, acquired the legal and paramount title, seems not to be denied. That no legal title can vest in defendants until the confirmation of their claim, under the act of the 3d March, 1851, is clear (2 Howard, 316). But it is contended that the Congress of the United States have dedicated the minerals in the lands of California to the public.

The grounds on which this proposition is placed by defendants' solicitors are:

1st. The United States by their general policy, and the direct concurrence of the executive branch of the government, have encouraged the working of mines and the employment of mining capital in California.

2d. The State has done the same by express legislation; and all the departments of the State government have concurred in establishing mining operations in the State on public land as the paramount interest of the State, to which all other industrial branches are subservient.

We shall not pause to inquire into the legislation of this State in relation to minerals on the public lands of the United States. One thing is certain, that neither her policy nor legislation, however much they may influence the action of the legislature of the Union, can deprive the United States of any legal right, or influence the action of this court in this case. That has been guarded against in the act of congress passed 9th September, 1850 (9 U. S. Statutes, 452), entitled "An Act for the admission of the State of California into the Union." In that act it is expressly provided, "that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits; and shall pass no law, and do no act, whereby the title of the United States to and right to dispose of the same, shall be impaired or questioned."

As to the ground that the Congress of the United States have dedicated the minerals to the public, and hence there is no equity in this bill, it is difficult to perceive, if such dedication had been made how it could affect in any way the equity of the present claim. Suppose it to be the fact, how can it affect the rights of defendants' private claim? If such dedica-

tion does authorize the occupancy of the public lands, and permit persons who occupy them to dig the minerals in conformity with State laws, can the acquiescence of the general government in their so doing, aid legally or equitably the title of defendants, who do not claim under that permission, but claim to have an adverse and exclusive right to the property as against the United States and all the world?

The claim of these defendants of the exclusive ownership of the mine, is inconsistent with the title they attempt to set up, under the dedication by Congress of the minerals to the public. They cannot in the same breath set up a superior adverse title, and also a right to work the mine by reason of a dedication of the minerals to the public.

Congress has never parted with the right (reserved as we have seen by the act admitting this State into the Union) of disposing of the public mineral lands. They have merely exempted them from the general land laws, and have omitted to legislate in regard to them except to exempt them from preemption rights, by the act of 3d March, 1853.

They can at any moment dispose of them. The defendants did not enter upon the premises by virtue of any tacit or implied permission and license, but adversely as owners, and claim the lands as theirs, whatever disposition the United States may make with regard to the public mineral lands. If relying upon such permission to all persons to enter upon, and work mineral lands, defendants had entered, it might be a sufficient answer to a bill for an account of profits during the time such permission continued. But defendants did not enter, nor do they claim under such license, but adversely as owners.

The United States having the title to the mine, the court cannot say that they have lost their rights, because, with regard to other minerals they have not asserted them.

Congress, to whom alone under the constitution of the United States, regulations for the disposal of public property is confided, have, so far as their action goes, manifested their determination to relinquish no right to any public land in California. Having protected in the act admitting the State into the Union, their title to the public lands so far as the State was concerned, they proceeded to guard that title from individual claimants.

The treaty of Guadalupe Hidalgo addressed itself to the political department; and up to the passing of the act of 3d March, 1851, that department alone had power to perfect titles and administer equities to claimants. (13 Howard, 260.) Congress in the fulfillment of its treaty obligations, passed that act entitled "An act to ascertain and settle the private land-claims in the State of California."

It is an established principle of jurisprudence in all civilized nations, that the sovereign cannot be sued in its own courts, or in any other without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it. (*Beers* v. *State of Arkansas*, 20 Howard, 527.)

Under this power, the political department transferred, by the act of 3d March, 1851, the power of perfecting titles and administering equities to individual claimants.

Aware that many claims would be made under Mexican titles, some legal, others equitable and inchoate, and others fraudulent, and with a view to segregate all lands of individual

claimants from the public domain, Congress passed the act in question. Desirous to fulfill in a liberal spirit the treaty obligations of the government, they imparted to the tribunals to which the jurisdiction was committed, rules of decision different from those which obtained in the ordinary judicial tribunals of the country. This extended range of principles was made their rule of action, to effect what Congress purposed they should; that is, to enable them to confirm a large number of claims which were inchoate and, being no evidence of legal title, presented inchoate and equitable rights, commending themselves to courts regulated as those tribunals were by the "principles of equity which could not be enforced by the ordinary judicial tribunals."

We consider it evident that the United States have a title and interest in the premises in dispute, and have a clear right in a proper case to invoke the interposition of a court of equity to protect the property until the title to it is ascertained in the manner prescribed by law—whether it be public land or not. One of the terms on which the United States consented to be sued, is prescribed in the 13th section of the act; which enacts that all lands the claims to which have been finally rejected by the commissioners, or which shall be decided to be invalid by the District or Supreme Court, shall be deemed, held, and considered as part of the public domain of the United States. (Dunlop's U. S. Laws, 1296.)

The fact is admitted by the pleadings in this case, that a petition is pending in behalf of defendants, in the name of one Andres Castillero, in the District Court, on appeal from the commissioners, having for its object a confirmation of the title to these premises. The result of a decision in one way will be to segregate the premises from the public domain; and they will not be segregated until such decision is made. A contrary

decision will leave the property in the hands of complainants. Can it be successfully asserted that the United States have no such interest in the mine as will authorize a court of equity to protect the property while that issue is pending?

We consider the legal title to this property to be in the United States, until it is decided to be private property. But suppose it be assumed that the interest held by the United States is to be confined to what they hold under the act of 3d March, 1851. If such assumption be made, it may be contended that, so limited, it is a mere contingent interest, and not to be protected by the court,—that it is not a vested interest. The answer to such suggestion is, that the right or interest of defendants is equally contingent; and again, that the right of complainants, if it be admitted to be contingent, will not deprive it of protection from a court of equity in a proper case.

The court will grant an injunction when the aggrieved party has only equitable rights. Thus in cases of mortgages, if the mortgagee or mortgagor in possession commits waste, or threatens to commit it, an injunction will be granted. So where there is a contingent estate on an executory devise dependent over upon a legal estate, courts of equity will not permit waste to be done to the injury of the estate. In case of a mortgagee filing a bill to stay waste by the mortgagor in possession, the court will interpose, although the right of the mortgagee in the land or its proceeds is contingent upon his recovery of the debt, to secure payment of which the mortgage was given. In *Camp* v. *Bates* (11 Conn. 51), a bill was filed to enjoin waste upon property on which complainant held a lien as an attaching creditor, under a law of the State. It was admitted that by the attachment the party acquired no legal title to the property, and that he might never obtain one. The

court say, It has been urged that the "plaintiff had neither an equitable nor a legal title. That he had no interest in the estate, none which a court of equity would consider a vested interest;" and the court proceeds to inquire into the right of the party, and coming to the conclusion that the attachment, when completed, would bind the estate under the provisions of the law, say, "We are not, then, to speculate as to the result whether the creditor will recover at all, or recover the full sum he demands. The estate attached is to be held subject to meet that recovery, be it more or less. The question then arises, Does the law give this privilege and then leave the debtor to take it away or destroy it? Does the law give a privilege and allow the party against whom it is given to render it useless? Is a court so utterly impotent, or is it so fettered by its own rules, that this may be done and the court have no power to prevent it? Did not the plaintiff, by his levy, acquire the sanction of the law that the property should stand pledged to await his judgment? Had he not, then, a right acquired by this lien, a right which a court of justice is bound to respect and defend? It is not indeed a legal interest, which would pass by a release deed; but it is a right not less sacred, and no less regarded by a court of law."

The fact, then, that the interest of the complainants under the act of congress of 3d March, 1851, is made contingent, does not defeat their right to the protection of the court. We have referred to this last case, to show that the submission by the United States of their title to a contingency, does not affect injuriously the present application.

The bill in this case prays for an injunction to stay future waste, and also that the action of the court may extend to the preservation of the ore and materials now upon said mine and land, and all the quicksilver extracted from the ore of said

mine in the possession of said defendants. It is urged that injunction is not granted in restraint of the removal of that which has been disconnected from the realty and assumed the shape of chattels.

In the case of *Watson* v. *Hunter* (5 Johns. Ch. 169), the principle affirmed is that in *ordinary* cases where no special circumstances intervene, injunction will not be issued to prevent the removal of timber already cut. Chancellor Kent concludes his opinion by saying, "I do not mean to be understood to say that the court will never interfere, but that it ought not to be done in ordinary cases like the present."

In *Winship* v. *Pitts* (3 Paige, 259, 261), it is said, In ordinary cases, the account for waste already committed is merely incidental to the relief by injunction against future waste, and is directed to prevent a multiplicity of suits. The rule, however is general, that although the recovery of damages for waste is not a substantial ground for a bill in equity, yet if the court has jurisdiction of the subject upon any other ground, it will decree an account of the waste committed. (1 Lead. Cases in Equity, 554).

In *Backler* v. *Farrow* (2 Hill So. Car. 111), the court asserts the general rule to be, that damages for waste cannot be recovered, the remedy being at law; but they say, "But, having proper jurisdiction of the case, there is hardly any question in relation to property which this court may not determine incidentally, for the purpose of doing complete justice and preventing multiplicity of litigation. The rule as laid down in the case of *Jesus College* v. *Bloom* (3 Atk. 262; Ambler, 54), is that a bill will not lie for waste merely, but if the party be properly in court for another purpose, as to obtain an injunction, then an account of past waste will be granted. "There are many cases where this court have made decrees in the cases of mines

which they could not have done in the cases of timber. There is no question that the court was in possession of this case, and incident to it was the accounts for rents and profits and the account for waste."

Where an injunction against waste is granted, if the complainant has a claim in law to satisfy for the value of the timber or other matters, the removal of which constitutes the waste, he is entitled to an account as of course, as incident to the injunction and to prevent multiplicity of suits. (1 Lead. Cases in Equity, 554.) Now, the removal of large amounts of minerals constitutes waste. The result of the doctrine furnished by the authorities is, that in an ordinary case an injunction will not be issued to operate upon past waste; but that in cases where the court has original jurisdiction of the case, and the party is properly in court for some other purpose, for instance, to obtain an injunction, or where there is the allegation of fraud, or where the removal constitutes a part of the waste, the court may extend its protection to past waste. That the cases which constitute exceptions to the rule which applies to ordinary cases are those where the profits of mines and the opening of mines is the waste complained of.

To this point is the case of *Jesus College* v. *Bloom* (Amb. 56), where the court, referring to an authority cited, say, "The more probable reason for decreeing an account in that case seems to be because it was the case of mines; and the court always distinguishes between digging of mines and cutting of timber, because the digging of mines is a sort of trade; and there are many cases where this court will relieve and decree an account of ore taken when in any other tort or wrong done it has refused relief."

We consider this case not to be the ordinary one of cutting timber, but the working of a valuable mine, and that the

injunction in this case should extend to ore extracted, and remaining on the premises as well as to future waste.

A careful examination of this case has brought the court to the following conclusions: That the complainants have exhibited a title to the premises in dispute, which entitles them to an injunction to stay waste upon it; that the character of the waste complained of is what the law deems irreparable mischief; that the allegations of the bill charging forgery, fraud, and ante-dating upon the documentary title under which defendants claim, have only been denied "on information and belief," which will not authorize the court to consider the allegations in the bill on this motion as disproved; and lastly, that the facts as shown by the exhibits annexed to the pleadings, and the affidavits filed, if they are to be considered, do not set forth circumstances showing good faith, which, according to Mr. Justice Woodbury, in *Parker* v. *Wood* (1 Wood. & Minot, 281), must accompany "a general denial" of plaintiff's title, in order to make it sufficient.

The court, therefore, are constrained by a "judicial necessity," to grant the injunction prayed for.

The injunction will be temporary, subject to the further order of the court. It is not to be anticipated that either party will interpose any obstacle to the prompt determination of the issue as to the title to the premises now pending. But it is deemed proper to keep this injunction under the control of the court, so that it may be able to do what subsequent events may require.

The bill prays that a proper person or persons may be appointed receivers of the said tract of land, mine, and minerals, take possession of the same, with the appurtenances, receive the profits of same, and all the ore of said mine, and the quicksilver extracted therefrom, and to lease, work and manage the said mine, and receive the rents, issues and profits thereof, and

the ore and quicksilver to said mine or elsewhere, in the defendant's possession, that has been extracted from said ore; to make sale and disposition thereof, to be accounted for under the order of this court. The court do not consider that the appointment of receivers with such extreme powers, is at this time necessary.

The ground on which the court has felt it to be its duty to interpose by injunction in this case, is to preserve the premises from waste and destruction, while the title to it is undecided. It has also considered it its duty to enjoin against the removal of the ores which have been already extracted, and remain on the premises. Every object contemplated by the bill, and which the court desires to effect, would seem to be attained by enjoining the further working of the mine, and the reduction and carrying off the ores now on the premises. Unless those ores are liable to deterioration, from natural causes or by being plundered, there is no necessity to appoint a receiver. If, however, it be made to appear that the condition of those ores is from any cause insecure, or other circumstance which may call for further interposition, the court will take into consideration an application for the appointment of a receiver.

An injunction, in accordance with the prayer of the bill, and in conformity with the views herein expressed, will be submitted, by the solicitors for complainants, to the court.

HOFFMAN, Dist. J.—In the opinion just read, this case has been considered on the allegations of the bill and answer alone, excluding all affidavits on either side relating to title.

It has been seen, however, that in the opinion of Judge Story, the court to prevent irreparable mischief may look to "affidavits in affirmance of the plaintiff's title, not so much

with a view to establish that title, but to see whether it has such a probable foundation in the present stage, as to entitle the plaintiff to be protected against irreparable mischief, if upon the hearing of the cause it should turn out to be well founded." (*Poor* v. *Carleton* 3 Sumner, 81.)

Had no answer been filed, it is clear that the court, as in the case of *Lloyd & Passingham* (16 Vesey, 59), and in that of *Perry* v. *Parker* (1 Wood. & Minot, 281), relied on by the defendants, might have heard the motion on affidavits filed on both sides.

Unwilling to rest the decision of the motion upon what may seem a technical and rigorous rule, and on allegations in the bill which are assumed to be true merely because not met by a positive denial in the answer, we have looked into the affidavits on either side with a view of ascertaining whether the complainants, assuming such an inquiry to be admissible, have made out such a *prima facie* or probable case, as will warrant the interference of the court in this preliminary stage of the cause.

That the court will interfere to prevent the destruction of the estate or fund, even though the title is disputed, has already been abundantly shown. That it will so interfere against a party in possession, and even against such a party having the legal estate, is also clear. The inquiry arises, What must be the nature or force of the evidence which the court will exact before it exercises this authority?

It is admitted in the case of *Perry* v. *Parker*, that a mere denial of plaintiff's title, without any evidence to show the denial to be made probably in good faith, and to be sustained by something of fact and law, is not sufficient.

In Daniel's Ch. Pr., p. 2027, it is said, The court will appoint a receiver against a party having possession under *a*

legal title, if it can be satisfied that such party is wrongfully entitled to such legal estate.

Where the right to the possession is in dispute, the court will, if it sees clearly that the plaintiff has the right, and that the ultimate decree will be in his favor, appoint a receiver pending the suit. (*Id.*, p. 2026.)

It might be inferred from these authorities that the court will in no case interfere against a party in possession, unless on evidence sufficient to satisfy it that he has no title.

Such, however, we do not conceive to be law. The extracts from Daniel's Practice, above cited, refer to cases where the property is in possession of a party having the legal estate. In such cases much reluctance is undoubtedly felt by courts of equity to interfere by injunction.

But even in such cases, the case of *Lloyd v. Passingham* impliedly sanctions the doctrine that where there is danger to the substance of the inheritance, and the damage apprehended is great and irreparable, the court will not confine its interposition to those cases alone, where it can declare itself satisfied that the defendant has no title.

In the case of *Perry* v. *Parker*, it does not appear that any irreparable injury was apprehended; and even in that case the court enters into an elaborate examination of the titles of plaintiff and defendant with an evident inclination to the opinion that the former is more than doubtful.

Daniel, on the page succeeding that on which the last citation is found, states that though the court will not interfere on the mere ground of title, it will appoint a receiver at the instance of parties beneficially interested, even where there is no fraud or spoliation, provided it can be satisfactorily established that there is danger to the estate or fund, unless such a step is taken.

In the case of *Poor* v. *Carleton*, Judge Story says, "The true rule seems to me to be that the question of dissolution of a special injunction, is one which after the answer (denying the whole merits of the bill) comes in, is addressed to the sound discretion of the court. In ordinary cases the dissolution ought to be ordered because the plaintiff has *primâ facie* repelled the whole merits of the claim asserted in the bill. But extraordinary circumstances may exist, which will not only justify but demand the continuation of the special injunction. This, upon the principles of a court of equity, which will always act to prevent irreparable mischiefs and general inconvenience in the administration of justice, ought to be the practical doctrine; and I am not satisfied that the authorities properly considered establish a contrary doctrine." And this, says Judge Story, seems to have been the course which commended itself to the mind of that great equity judge, Chancellor Kent. (*Poor* v. *Carleton*, 3 Sumner, 76–82.)

We think that the opinion of Judge Story above cited, is sufficient authority for the position that in cases, like the present, of irreparable mischief, the court in examining the affidavits, assuming them to be admissible, will inquire whether the title of the plaintiff has such a probable foundation as to entitle him to be protected during the litigation by which it will finally be determined. And that in cases of threatened waste and destruction of the estate, where the apprehended injury is great and irreparable, as also in cases of the threatened destruction of heir-looms, works of art, &c., the court, in the exercise of a sound discretion, should interfere even in doubtful cases to preserve the parties in *statu quo* until the right can be determined.

We will therefore examine to some extent the evidence which has been adduced on either side, and which has been so

largely discussed at the bar, in order to see whether the complainant's title appears to have such a probable foundation, and the allegations of the bill are sustained by such proof, as to warrant the court in interposing to protect the estate until the determination of the right.

The title set up by the defendants consists of an alleged mining right or title, originally acquired by denouncement and registry under the mining laws of Mexico; and secondly, an alleged concession of two *sitios de ganado mayer*, made by the supreme government of Mexico.

The evidence of the mining right or title is in the form of an *expediente* or record, consisting of two letters of Andres Castillero, addressed to Antonio Maria Pico, Alcalde, and an act of possession purporting to be executed by that officer, in which he recites that he has given possession of the mine and of three thousand varas of land in every direction, to Castillero.

The evidence of the two-league grant consists of a dispatch from Castillo Lanzas, Minister of Exterior Relations of Mexico, addressed to the governor of California, but produced by the defendants.

In this dispatch a communication to Lanzas from the minister of justice, is set forth. In that communication the minister of justice transcribes a communication addressed by himself to Segura, President of the Junta for the Encouragement of Mining. In this last communication, the minister of justice informs Segura, that the president has been pleased to approve the agreement made with Castillero, to commence the exploration of the mine, and that the corresponding communication is made to the Ministry of Exterior Relations, that it may issue the proper orders relative to what is contained in the 8th proposition with respect to the granting of lands in that department.

The minister of relations, after reciting the above letter, adds, "And I have the honor to inclose it to your Excellency (Lanzas) to the end that with respect to the petition of Senor Castillero, to which his Excellency the President *ad interim*, has thought proper to accede, that as a colonist, there be granted to him two square leagues upon the land of his mining possession, your Excellency (viz. Lanzas) will be pleased to issue the orders corresponding."

Castillo Lanzas thereupon adds, "Wherefore I transcribe it to your Excellency (viz. the governor of California), that in conformity with what is prescribed by the laws and dispositions upon colonization, you may put Senor Castillero in possession of the two square leagues which are mentioned. God and Liberty, Mexico, May 23, 1846. Castillo Lanzas. To His Excellency, the Governor of the Department of Californias."

It is not pretended that this dispatch was ever delivered to, much less acted on by, the governor of California. On its face it purports to be merely one official communication reciting another, in which it is stated that the president has thought proper to accede to an application for a grant, and that fact is communicated to the governor in order that he, in conformity with the laws of colonization, may put the applicant in possession.

Whether a dispatch of this kind, addressed by one Mexican functionary to another, never acted on by the latter, and which in all probability could not have reached him until after the subversion of Mexican authority in this country, and after the rights of the United States by conquest had accrued, could convey any title either legal or equitable to a person who, during the existence of the Mexican authority, did no act whatever on the faith of it, it is not necessary now to decide. It is at least clear, that it is not a formal grant. It is at most,

evidence that the president had acceded to a petition for two leagues of land. It is not addressed to the petitioner, nor intended as a muniment of title to him. It is but an order to the governor to make him a title and put him in possession. Whatever title, therefore, the defendants may claim under this official letter, it is evident that it can be at most but equitable and inchoate. And that, as the two leagues were never measured off to the applicant, nor was he put in possession by Mexican authority, the legal title and right of possession to the land vested by the conquest in the United States.

It was not contended at the hearing that any measurement was made or possession given of any specific tract of land by metes and bounds, or that the three thousand varas in every direction, mentioned in the act of possession, were marked upon the ground. It is also clear, that the mining judge, under the ordinances, had no right to give possession of a tract so extensive. It is claimed, however, that this act of possession was ratified and confirmed by the supreme government.

No formal act of ratification is produced, or alleged to have been made. The evidence of the ratification is to be found, if at all, in the letter of Lanzas, already cited, and in the communications which it recites, and copies of which are produced, taken, it is alleged, from the Mexican archives. As Castillero, in his proposals to the mining junta, had asked that body to recommend the ratification of his mining possession, and as the communication from the minister of justice states that the president has been pleased to approve in all its parts the agreement made with Castillero, it is urged that that letter is evidence of such ratification. Whether or not it should so be considered, it belongs to another tribunal to decide. It is not claimed, however, that any possession by metes and bounds of this 3,000-vara tract was taken, nor was any survey or mea-

surement effected until long after the conquest of the country, and after the rights of the United States had accrued.

It is evident, therefore, that the defendants can claim no legal estate or prior adverse possession, either in the two-league tract which they have surveyed, and now occupy, or in the 3,000-vara tract, mentioned in the alcalde's act of possession.

But all these documents are in the bill charged to be fraudulent, and ante-dated.

The evidence chiefly relied on in support of this allegation, is contained in a correspondence attached as an exhibit to the bill.

The genuineness of all of these letters, except one, is admitted. The answer denies "that the said letters and communications were written by the said parties with intent to commit a fraud, or in furtherance of a conspiracy to fabricate a title, as charged in said bill, except so far as the said intention appears from said letters on the part of the said James Alexander Forbes." § 32.

Two of the defendants claim under James Alexander Forbes. As to him, the conspiracy to fabricate a title "so far as appears from said letters," is admitted.

An examination of the letters will, however, convince us, that whatever fraudulent designs were entertained by James Alexander Forbes, were equally entertained by the parties whose agent he was, and with whom he was in correspondence, and that the somewhat anomalous case is not presented of a conspiracy by one person.

The original act of possession, or registry of the mine, was obtained, as alleged by defendants, by Castillero for the benefit of himself and his *socios* or partners. On the 12th June, 1846, Jose Castro, in pursuance of powers given to him, as he recites, by his other partners, executed a power of

attorney to one McNamara, authorizing him to enter into a contract for the three pertenencias of the mine with an English company "with exclusion of any other nation." This power of attorney, if its date be genuine, must have been executed on the occasion of McNamara's visit to California in May, 1846, as mentioned in Alexander Forbes' letter of May 11, 1846. He seems not to have immediately acted on it, for a letter is produced from him, dated at Honolulu on the 27th September, of the same year.

As the alleged dispatch of Castillo Lanzas was written in Mexico on the 23d May, 1846, it is evident that at the time of executing this power of attorney, the only evidence of title to the mine which Castro could have possessed, or the existence of which he could have known, was the act of the alcalde, in which possession is given of three thousand varas in every direction from the mine. The power of attorney, however, exclusively refers to three *pertenencias* of the mine.

In pursuance of this power of attorney, McNamara, on the 28th day of November, 1846, at Tepic, entered into a contract with Alexander Forbes for the working of the mine. It is, we think, evident from the letter of Alexander Forbes, of January 7, 1840, that Castillero was present at this negotiation. In that letter, Forbes says, "I had the pleasure to receive your very obliging letter of the 29th October last (1846), which chiefly relates to the mine of quicksilver about which I wrote you at so much length by Mr. McNamara. I had, previously to the receipt of your letter, been in treaty with D. Andres Castillero, and on the arrival of Mr. McNamara with powers from the other proprietors, the treaty was much facilitated; and I am now happy to inform you that I have contracted the *habilitacion* of the mine, and have purchased a portion of Mr. Castillero's Barras, all of which will be made known to you by

Mr. Walkinshaw, who goes to California as my agent and attorney for the examination and working of the mine."

If, then, as would seem to be the case, Castillero was present when the contract between Forbes and McNamara was entered into, it is strange that he did not himself become a party to it; and it is still more strange that the contract refers exclusively to the working of "the three *pertenencias* embraced in said quicksilver mine," and makes no allusion whatever to the two-sitios tract which Castillero must at that time have obtained.

The instrument by which Castillero ratified this contract, and also that by which he sold a portion of his *barras*, are dated in Mexico on the 17th December, 1846. In the deed of ratification, for the first time allusion is made to the two square leagues conceded to Castillero, and a copy of the Lanzas dispatch is annexed to it. No reference is, however, made to the mining possession of three thousand *varas* in every direction, nor to any alleged confirmation of it, but the contract of McNamara for working the three *pertenencias* of the mine is alone referred to.

In the letter of James Alexander Forbes, in reply to that of Alexander Forbes, of January 7th, 1847, and to another of the 27th January, which is not produced, he says, "It is of the most vital importance to obtain from the government of Mexico a positive, formal, and unconditional grant of the two *sitios* of land conceded to D. Andres Castillero, according to the decree appended to the contract, and also an unqualified ratification of the judicial possession which was given of the mine by the local authorities; including, if possible, the three thousand *varas* of land given in that possession as a gratification to the discoverer. These documents should be made out in the name of Don Andres Castillero." He then expresses

the opinion that it will not be difficult to obtain these documents from the supreme government, and adds that they should be of the date of the decree of Señor Lanzas. This letter is relied on by the defendants, as showing that at that time the decree of Lanzas, as now produced, was in existence. It must be admitted that the reference to a dispatch of Lanzas, ordering a possession of two *sitios* to be given, is clear. Whether that dispatch is in all respects the same as that now exhibited, does not so certainly appear. But it is equally clear that the recommendation to procure other documents, the dates of which were to be false, is unequivocally and explicitly made.

No letter is produced from Alexander Forbes, which discloses the manner in which this proposition was received; but in October of the same year, we find that the latter has come to California, and is actively engaged in exploring the mine. His proceedings while here will hereafter be referred to.

Mr. Alexander Forbes seems to have remained in California until the end of March, 1848. In April of the same year, he appears to have sold his interest in the contract to various *habilitadores*, among whom, Jecker, Torre & Co. and the house of Barron, Forbes & Co., of Tepic, were chiefly interested.

The first letter from these parties is dated on the 20th May, 1849, and is addressed to James Alexander Forbes. It commences as follows: "From certain circumstances you have communicated to us, it may be necessary to purchase some lands in the vicinity of the mine of New Almaden." It then empowers James Alexander Forbes to make such purchase at a sum not exceeding $5,000. On the 27th May, 1849, a *memorandum* was left with Alexander Forbes, at Tepic, by James Alexander Forbes, "of the documents which Castillero will

have to produce in Mexico." The documents required were as follows: 1. A full approbation and ratification of all the acts of the alcalde; 2. An absolute and unconditional title for two leagues of land to Andres Castillero, with boundaries which are mentioned; 3. The dates to be arranged by Don Andres, and to be certified by the American minister. We will hereafter see that this memorandum was alluded to, and its contents repeated, in subsequent letters between the parties.

On the 28th October, 1849, James Alexander Forbes, in a letter to William Forbes, again alludes to the insecurity of the title on which the mine was held. After stating his apprehensions of the destruction of some important papers of the original registry of the mine; or, that a question might arise as to their legality; and, after adverting to the fact, "that no posterior grant of the government could authorize the occupation of the land of the Berreyesas, on which the mine is declared to be situated, in the original *expediente* of registry," he adds, "In view of these facts, it behoves you to obtain from the supreme government of Mexico, the full and positive grant of the two *sitios* of land upon the land of New Almaden, under date of the order to Castillo Lanzas, bearing in mind that this document must express the entire approbation of the supreme government of all the concessions made by the local authorities or alcalde of the district of San José, of the original grant or registration of the mine." He then proceeds to give the boundaries which should be mentioned in the concession. They are the same as those given in the *memorandum* above referred to.

In the succeeding letter which, perhaps erroneously, has the same date as the last, James Alexander Forbes again calls the attention of William Forbes to the importance of his suggestions relative to the "perfecting of the title to the mine,"

and adds, "Without now entering into particulars, already explained to yourself and Mr. Alexander Forbes verbally, I desire only to impress upon your mind the vast importance of securing from the supreme government of Mexico the documents comprised in the memorandum left with Mr. Alexander Forbes when I was in Tepic, for Castillero."

On the 30th October, 1849, he again recurs to the subject. In his letter of that date, he says, "You will now readily perceive the great importance of my advice to purchase a part both of the lands of Cook and of the Berreyesas. You were of opinion that this measure would not be necessary, in view of the *supposed facility of getting the title to the mine perfected in Mexico.* It is now more than five months since it was decided that Castillero should procure the necessary documents in that city, and that they should be sent as soon as possible. On the one hand, I depend on the *precarious* and illegal possession of the mine granted by the alcalde to Castillero, who was in reality the judge of the quantity of land given by the alcalde. On the other side, I am attacked by the purchasers of the same land declared by Castillero himself to comprise the mine."

He concludes as follows: "I do entreat you to use every effort to send me the document of the ratification of the mine, and the grant thereon, at the very earliest opportunity—*properly authenticated and certified, as explained by me when I was in Tepic.*"

On the 30th November, 1849, Barron, Forbes & Co, reply to the communications of Jas. Alex. Forbes.

As this is the first letter in which his suggestions are noticed by the parties with whom he was corresponding, it is important to see how they were received, and how far the allegation of the answer that the design of fabricating a title existed on the part of James Alex. Forbes alone, is sustained.

After acknowledging the receipt of letters and communications from Jas. Alex. Forbes, by the steamers "California" and "Panama," Barron, Forbes & Co. say, "We are glad that you have not been obliged to purchase Berreyesa's land. This is certainly a most important point, and we trust that the document sent will be of great consequence in that respect. But you will of course take care that no risk is run, and you will do in this affair as your best judgment shall direct you, keeping in view that *at all hazards, and whatever cost, the property of the mine must be secured. Castillero, we expect, will soon be here, from Lower California, and if anything can be done in Mexico, he is the fittest person to procure what may be wanted.*"

On the 1st December, 1849, Alexander Forbes writes to James Alex. Forbes, as follows: "The document sent up to you by the last steamer, for the grant of lands to D. Andres Castillero, was *by mistake, not the one meant to be sent. I find now that the proper one was registered by me in Monterey, and the original deposited there.* The one sent you was directed at foot to the governor of California, and the one deposited at Monterey was directed *to Don Andres Castillero. The difference is, that by one the delivery by the governor was perhaps necessary to make the grant valid, whereas the other, being addressed directly to Don Andres, did not require that formality*, nor was any other proceeding necessary, thus making it a better document than the greater part of the other titles for lands in California." He then proceeds to advise James Alex. Forbes to apply for a copy of the Monterey document, and to withdraw the one sent, and substitute the other. After reminding him of "another difficulty," viz. that the instrument made in the city of Mexico contains an exact copy of the document

sent to him, and addressed to the governor, he concludes by leaving the whole subject to the discretion of his correspondent.

It is apparent, from this letter, the genuineness of which is admitted, that two documents were then in existence, purporting to be concessions of land to Castillero. One addressed to the governor, which is that now produced, and one addressed to Castillero, which has disappeared. None such has been found at Monterey, where Alexander Forbes himself states he deposited it; nor do the defendants now claim that any such document was ever issued. If, as Forbes states, such a document was deposited in Monterey, it must have been fabricated. For the theory of this case on the part of the defendants is, that the dispatch to Lanzas, addressed to the governor, constitutes their only title for the two-sitios grant.

On the 20th December, 1849, Jas. Alexander Forbes, in a letter to Barron, Forbes & Co., acknowledges the receipt of a certified copy of the grant of the two *sitios* to Castillero, and states at length his opinion that it is insufficient. He again urgently recommends that "Castillero, or some other fit person, should obtain from the supreme government of Mexico, a positive, explicit, and unconditional grant of the two *sitios* of land. In this document particular reference must be made to the concession of the mine by the alcalde of San Jose, approving of said concession, and conceding to Castillero and his associates in place of the three thousand varas, the said two *sitios* of land, citing dates, and *making that of the said document to correspond with the imperfect and ambiguous document of which you have sent me the copy.*"

At the close of this letter he adds, "I pray you not to be deluded into the belief that there will be no necessity for *obtaining* the document herein described."

On the 29th January, 1850, James Alexander Forbes acknowledges to Alexander Forbes, the receipt of a copy of the contract of *habilitacion*, and adds, "As you request me to address myself to B., F. & Co. (Barron, Forbes & Co.) on the affair of the mine, I have now written upon this particular subject, to which I request their earnest attention, not as regards the habilitation, *but another document which you know of.*"

On the 3d February, 1850, Alexander Forbes writes to James Alexander Forbes as follows: "I have every reason to believe that the documents you mentioned will be found in the city of Mexico; and as Mr. Castillero will return there, they will no doubt be procured; but we are at some loss to know what *is exactly wanted*, and I beg you will by the next steamer give a sketch of the documents to which you allude, particularly a description of the limits of the grant. I think you must not have received the information sent you of the existence of the grant of the two *sitios* directly to Castillero and registered in Monterey; nor am I sure if that will mend the matter."

After alluding to a last resort which he mentions "with great repugnance," viz., "the promotion of the invalidation of the title of the Berreyesas to their rancho, and adding that "if no opposition or disclosures are made, they may be left in possession," he proceeds as follows:

"We think at present that it may be the best plan to get an authenticated copy of the approval of the Mexican government of the grant of 3,000 varas given by the alcalde. Castillero says such approval was given, and that on his arrival he will procure a judicial copy of it. This is the plan we shall adopt, if we hear nothing from you to alter this resolution. Since writing the foregoing, I have looked over your private letter to William Forbes, dated October 18th, and find you state the limits or boundaries as follows." Mr. Forbes then

states the boundaries, and adds, "Castillero is not certain of accomplishing this latter plan, and thinks the first, that is, the three thousand varas, the best."

And on the 6th February, 1850, Barron, Forbes & Co. write to Jas. Alex. Forbes, informing him that "they had hoped that the document lately sent for this grant to Castillero, would have been sufficient; but as you seem doubtful on this point, we have spoken to him, and his opinion is, that if this grant is not tenable, it will be better to go upon the three thousand varas of the alcalde, granted at the time of giving possession of the mine, and approved of by the Mexican government, which approval will be taken from the Mexican archives and sent on to you."

On the 26th February, 1850, Jas. Alex. Forbes again addresses Alexander Forbes on the subject of the title. He says, "I really did have more faith in the tact and ability of Castillero to perceive the important objects set forth in my memorandum of what was to be done nine months ago by that eccentric individual, and that with the powerful *influence he was to have exercised, and the efficient aid that was to be lent him, he would meet with no obstacle to the attainment* of the important documents explained in that memorandum. But Castillero has deceived himself; for he thought that boundaries were not necessary, as I shall presently show you. He succeeded in obtaining the grant of two *sitios* to himself in the mining possession of Santa Clara, while that very act of possession declares that the mine is situated on the land of José Berreyesa, five leagues distant from Santa Clara, &c. Without troubling you with what I have so many times written and explained to you verbally on the importance of the acquisition of the *document*, I will only say now what it *must* be; and it is this." The documents so often mentioned are again described

with the impressive injunction that "both must *be of the proper date, and placed in the proper governmental custody in Mexico.*"

On the 2d March, 1850, Barron, Forbes & Co. inform James Alex. Forbes that "Mr. Barron and Don Andres Castillero are about to proceed to Mexico, *and will attend to what you have recommended.*"

On the 16th March, 1850, Alexander Forbes writes to James Alex. Forbes, "Mr. Barron and Castillero have gone off to Mexico, and I wrote them to-day respecting the *document you know of, which, if possible, will be procured.*" This letter significantly concludes, "*Let us have quicksilver and all will be well.*"

On the 7th April, 1850, Alexander Forbes informs Jas. Alex. Forbes that, "Mr. Barron and Castillero have arrived in Mexico, and have every *prospect of finding the documents you are aware of.*"

With this letter of the 16th March, 1850, all information as to the operations of Barron and Castillero in Mexico ceases. It is not disclosed what unexpected obstacle prevented their "*finding*" in Mexico the documents so much desired, or whether the doubts which Castillero entertained of "being able to accomplish *the latter plan*" (*i. e.* the grant of two sitios by definite boundaries) were unhappily realized.

Comment on the evidence afforded by these letters of a conspiracy to fabricate titles on the part, not of Jas. Alexander Forbes alone, as the answer admits, but of Alexander Forbes, and of Barron, Forbes & Co., is unnecessary. The full and specific instructions for the documents "*to be procured,*" and for the "arrangement of their *dates,*" originally given by Jas. Alex. Forbes, and so frequently referred to and repeated; the recital, in the letter of Alexander Forbes, of February 3d, 1850,

of the boundaries indicated in the memorandum left by Jas. Alex. Forbes at Tepic; the positive statement by the former that the documents mentioned would, no doubt, be *procured* by Castillero; the doubts as to the best "plan" to be pursued in their fabrication; the announcement by Barron, Forbes & Co. that Mr. Barron and Castillero "are about to proceed to Mexico, and would attend "to what Jas. Alex. Forbes had recommended;" the significant instruction of Alexander Forbes to Jas. Alexander Forbes that "*the document you know of*" will, if possible, be procured; and, finally, the announcement that they had arrived in Mexico, and "had every prospect of finding the *documents you are aware of*,"—seem to establish beyond doubt, the existence of the conspiracy to fabricate titles as alleged in the bill.

The nature of the suggestions of Jas. Alexander Forbes is as clear as language can make it. No answers from Alexander Forbes or from Barron, Forbes & Co. are produced in which those suggestions are rejected with the natural indignation of honesty. On the contrary, they are received and acted upon.

It is urged, however, that these letters themselves disclose that the Castillo Lanzas dispatch, now produced, was in existence at least as early as May 5th, 1847; and that therefore it must be regarded as genuine, whatever designs may have been subsequently entertained to fabricate or to "*procure*" other documents.

We have seen that this document for the first time appears in the instrument of ratification by Castillero, dated at Mexico, December 17th, 1846; that no mention is made of it in the contract of McNamara with Alexander Forbes, made at Tepic, and dated November 28th of the same year, although it would seem from Alexander Forbes' letter that Castillero was

then present, and must have then been in possession of the Lanzas dispatch if it was issued at the time it is dated. Admitting, then, that the dispatch referred to by James Alexander Forbes in his letter of the 5th May, 1847, is the same as that now produced, a copy of which is appended to the contract of the 17th December, it merely proves that the dispatch was in existence at the latter date, which was after the entire subversion of the Mexican authority in California.

If, however, the letter of Alexander Forbes of March 28th, 1848, be genuine, it is an express admission that all the documents produced by Castillero in Mexico as his title to the mine and lands were obtained long after the occupation of California by the Americans.

In that letter Mr. Forbes says, "But this interest renders it necessary for me to have the control of all the shares, in order that I may dispose of the whole whenever an opportunity may offer, and save myself from the heavy loss that would ensue should it unfortunately leak out that in fact all the documents procured by Castillero in Mexico as his title to the mine and lands *were all obtained long after* the occupation of California by the Americans." "This unfortunate irregularity cannot easily be repaired, and serious objections might be made to our new act of possession."

The authenticity of this letter is denied by the defendants. The original is not produced. It is stated by James Alexander Forbes to have been stolen from him. The existence of the original and the accuracy of the copy are sworn to by two witnesses, James Alexander Forbes and Robert Birnie. The latter swears that he was employed by one of the defendants to obtain from James Alexander Forbes any document that would be prejudicial to the mine, and he was informed that

any such document would be liberally paid for. He accordingly made a copy of the letter of Alexander Forbes of March 28, 1848, which he gave to Mr. Barron, by whom he was paid at the time $200, and $200 a few days afterwards. That the copy now produced is the same as that left with Mr. Barron, and that the original was in the handwriting of Alexander Forbes, with which the witness is acquainted. James Alexander Forbes states that on the day on which he furnished a copy of this letter to be given to Mr. Barron, the letter was stolen from his carpet bag.

The character of Mr. Birnie is unimpeached. No affidavits contradicting any of the statements made by him have been submitted.

We are therefore not warranted in treating the allegation of the answer that this letter is forged, as sufficient to establish the fact.

We have seen from the letter of Alexander Forbes of the 1st December, 1849, and from his letter of 3d February, 1850, that at the date of the former there were at least two documents for the grant of lands to D. Andres Castillero: one, a notarial copy of which had been sent to James Alexander Forbes, which was directed at foot to the governor; the other, the original of which was deposited at Monterey, and which was "directly addressed to Don Andres," and therefore did not, in the opinion of Alexander Forbes, require a delivery by the governor to make it valid.

This latter, as has been stated, has not been produced, nor is it pretended by the defendants that it ever existed. The fact that Mr. Forbes deposited at Monterey the original of a document which would thus seem to have been fabricated, may well suggest suspicions as to the genuineness of the other which is now produced.

In the exhibit attached to the deposition of Jose M. Lafragua, a copy of the Castillo Lanzas dispatch is found, together with a certificate of Jesus Vejar, a notary public, signed, as it recites, on the 1st March, 1850, "at the instance of Messrs. Barron, Forbes & Co." In this certificate the notary attests that the dispatch signed by Lanzas has "been respected under that signature, and obeyed by the Mexican authorities that governed in Upper California in the year 1846—according to insertions which said authorities made of said instrument in acts which they passed upon the subject of which they treat, and which I certify to have seen."

Almost every statement contained in this certificate is admitted to be false. It is not pretended by the defendants that the dispatch of Lanzas was ever delivered to the governor, nor that it was even presented to, much less "respected and obeyed by the Mexican authorities of Upper California, in the year 1846." The "insertions of said instrument, made by those authorities, in acts which they passed upon the subject," and which the notary certifies to have seen, are purely imaginary. When a certificate of this character is procured from a Mexican notary, by some of the defendants in this case, and by them filed as an exhibit, the court is surely justified in regarding with suspicion, not only all documents which are authenticated in a similar manner, but also those the genuineness of which is assailed by other proofs.

We have thus far considered the case as it is presented by defendants, and as it appears from the letters admitted by themselves to be genuine, with the exception of one letter, the genuineness of which they deny. We have not thought it necessary to enter upon a minute examination of the mass of evidence which has been offered on either side. That duty properly belongs to the District Court.

Whether or not the letters are susceptible of an explanation consistent with the *bona fides* of the parties by whom they are written; whether or not the testimony of Lafragua, and other witnesses, the mention of this grant in his report, and the production of the document from the archives, and other evidence which may be offered hereafter, will be sufficient to satisfy that court of the genuineness of the titles produced by the defendants, we cannot now anticipate.

We have only entered upon the inquiry so far as was necessary to show, that the allegations of fraud in the bill are sustained by testimony sufficient to suggest grave suspicions as to the genuineness of the titles on which the defendants rely, and to justify the court in interposing, by injunction, in behalf of the legal title to stay the destruction of the estate in controversy, pending the proceeding by which the validity of the title will finally be determined.

Allusion has been made to the visit of Alexander Forbes to California in October, 1847. His proceedings on his arrival will now be adverted to, with a view of showing how the possession of the lands and mine now held by the defendants was acquired.

In the letter of James Alexander Forbes to Eustace Barron, dated January 30, 1846, information is given that "Castillero, a sort of commissioner from the Mexican government, is working a quicksilver mine near the mission of Santa Clara." How long he continued in California does not appear except from the affidavit of Forbes, in which it is stated that soon after entering into partnership with his associates, he went to Mexico and never returned. It also appears from the same affidavit, that Padre Real, one of the partners, was left in possession. On the 22d September, 1846, James Alexander Forbes writes to Alexander Forbes, "I am now in charge

of the quicksilver mine, and am going to work it until I hear from Castillero, and am upon the point of striking a bargain for four shares." The motive for thus transferring the possession to James Alexander Forbes is stated by Mr. Forbes in his affidavit, and is in itself probable. It was to place the mine under cover of English protection, as the American forces were in possession of California, and Mr. Forbes was British Vice-Consul. The possession so delivered to Mr. Forbes comprised the mine itself, a log-cabin and shed, together with some old tools and utensils. The cabin was not occupied; but an Indian sometimes slept in the mine. Up to this time, 2,000 lbs. of quicksilver had been extracted. It is further stated by Forbes that this possession was kept up by Indians whom he sent to work there, although during the winter of 1846 it was for a time entirely abandoned.

Such seems to have been the situation of the property up to the time when Alexander Forbes acquired his interest in it by his contract with McNamara, and dispatched Walkinshaw to California as his agent. To him, Mr. James Alexander Forbes transferred the possession, and assays and observations were commenced. The scarcity of operatives and the indolence of the Indians appear, however, to have prevented any considerable operations. In the month of October, 1847, Mr. Alexander Forbes arrived in California, with tools and laborers.

On his arrival, explorations were immediately commenced, and on the 24th November, 1847, he announces the discovery of the "*cinta*," or vein of ores, the direction of which had been before entirely mistaken. On the 19th January, 1848, he writes to James Alexander Forbes, as follows: "I am very much obliged to you for your very prompt attention to the business in hand, and return the *expediente* immediately. I

am much surprised at the result of your assay, and shall try what I have. It will, of course, be better to *say nothing about it, particularly as I have already written to Monterey that there is no mine*; nor does there appear to be any quantity of this kind of stuff. I hope *soon to see the alcalde.*"

It is admitted in the answer that in January, 1848, the alcalde, James W. Weekes, made on the petition of Alexander Forbes, "a concession to him of the said mine, to correct and reform what had previously been given." The extent of the possession so given is stated by James Alexander Forbes to have been four *pertenencias*, or two hundred by eight hundred varas. It is to this "new act of possession" that Alexander Forbes probably alludes in his letter of 25th March, 1848, when he says "that serious objections may be made to its legality." Shortly after this possession was obtained, Mr. Forbes caused two square leagues to be surveyed around the mine, which in 1852 were put under fence, and have ever since been inclosed, and are now in possession of defendants.

It is obvious that neither the act of Weekes, by which possession was given of a tract of eight hundred by two hundred varas, nor the act of Forbes himself, by which possession was taken of two square leagues, can have any validity against the United States, who had already acquired the legal title to and constructive possession of the land.

It is not claimed that at the time of the first possession any measurement was made or boundaries fixed of the three thousand varas of which possession was alleged to have been given. No evidence has been offered to show that the possession up to the time of Weekes' measurement was other than that described in the affidavit of Mr. Forbes.

It has already been stated that the mining-title relied on by the defendants is claimed to be founded on a registry and act of possession by Pico, the alcalde of San José.

At the time when Weekes, the American alcalde, gave the possession of the mine and four *pertinencies* above referred to, Alexander Forbes also procured from him a certified copy of the *expediente* of the mine. This copy was prepared by James Alexander Forbes from an original furnished to him by Alexander Forbes; and to this copy the certificate of Weekes is annexed, certifying it to be "a faithful copy made, to the letter, from its original, the *expediente* of the mine of Santa Clara, or New Almaden, which exists in the archives under my charge." This certificate is admitted to be untrue, or at least inaccurate. The original from the archives of the alcalde has since been produced, and it shows that the copy certified by Weekes is neither "faithful" nor "to the letter." It is evident that the copy certified to by Weekes could neither have been prepared from nor compared with "any original existing in the archives under his charge."

The original *expediente* now produced, is stated by Capt. Halleck, the superintendent of the mine, to have been found by himself in the office of Mr. Belden, Mayor of San José, in the winter of 1851. If this document be indeed the original denouncement and registry of the mine, and if from the time of the denouncement it had remained on file as an original record in the alcalde's office, it is strange that the superintendent and counsel of the mine should so long have been ignorant of its existence.

In the suit brought in 1850 for the possession of the mine, by Berreyesa against James Alexander Forbes and Walkinshaw in the District Court for Santa Clara County, a motion was made

to require the defendants to produce "all papers of a pretended grant for two *sitios*, together with all other paper or papers connected with the title to said Almaden mine or the land upon which the same is situated, upon which defendants intend to found their claim to said land or said mines, &c." This motion was granted by the court, and said papers "*or copies thereof*" were ordered to be produced according to said motion.

To this order the defendants answered by affidavit.

In this affidavit they allege that they have exercised all diligence to procure the said documents; but have been unable to do so, but expect soon to receive them from the parties in Mexico who hold them."

They further aver "that the said documents and others which they have sent for in Mexico, are necessary to enable them to proceed to the trial of the cause; and they specify the following documents as absolutely necessary to them before they can proceed to trial."

1st. "The original denouncement of the mine of New Almaden, and the judicial possession given of the same in the year 1845."

2d. "The confirmation of said denouncement and possession by the supreme government in 1846, and prior to the late declaration of war by the United States against Mexico."

3d. "The original grant of land, including said mining possession, made by the supreme government of Mexico prior to the declaration of war as aforesaid to the owners of said mine."

This affidavit is sworn to by Mr. Halleck, one of the attorneys for defendants. It is evident that at this time, viz. December, 1850, Mr. Halleck could not have been aware that

the original denouncement of the mine and judicial possession of the same given in the year 1845, was not in Mexico but on file among the archives of the alcalde's office to which it belonged. Nor could he have been aware that the concession of two leagues and the ratification of the mining possession were not, as implied in his affidavit, contained in two documents, but in one, viz., the dispatch of Castillo Lanzas, and that that dispatch was not dated "prior to the declaration of war by the United States," but ten days subsequently.

But at this very time Mr. Jas. Alex. Forbes, one of the defendants in that suit, had already received a notarial copy of the Lanzas dispatch, addressed to the governor of California; and the original of another, addressed to Andres Castillero himself, he had been informed by Alexander Forbes had been deposited and registered in Monterey.

Up to the time of filing the petition of Castillero to the board of land-commissioners, the original *expediente* on file in the recorder's office seems to have escaped observation; for the exhibit filed with that petition is a copy of the document certified to by Weekes, and not a copy of that since produced from the recorder's office. We are aware that all these circumstances may be explained, and that the genuineness of this document is testified to by a number of witnesses. We have referred to the manner and time of its production, to show that it has not that proof of genuineness which would be afforded by its admitted production from the archives of a Mexican office, transferred to us on the acquisition of the country.

The defendants have also produced in support of their title a large number of documents, purporting to be copies of originals on file in Mexico. They consist of official communications from various officers in Mexico, and purport to be the proceedings of those authorities, on the application of Castillero

to the Junta for the Encouragement of Mining, and which resulted, it is claimed, in the concession of the two *sitios*, as shown in the dispatch of Lanzas.

None of these documents are authenticated under the great seal of Mexico. They are certified by the secretary or chief clerk of the departments in which the proceedings purport to have taken place. They have been recently procured in Mexico by an agent of the defendants.

Whether documents alleged to exist in the archives of Mexico, can be regarded by the court if unauthenticated by the political power of that country under its great seal, it is not necessary now to decide. But as they have been obtained since the visit of Mr. Barron and Castillero to Mexico, and as the last injunction of James Alexander Forbes to Alexander Forbes was to have the documents referred to by him "of the proper date, and placed in the proper governmental custody in Mexico," we are at least justified in regarding such documents with suspicion unless authenticated in the most satisfactory manner. But especially should we call for such proof, when we remember that the documents purport to be a grant of land in California, dated May 23d, 1846, and that the Mexican government, in the original treaty of peace with the United States, declared in the 10th article, "that no grants whatever of lands in any of the territories ceded to the United States had been made since the 13th day of May, 1846."

We have thus examined at greater length than was intended the evidence on which the United States rely, to sustain the allegations of fraud which are made in the bill. The evidence considered has been chiefly that afforded by a correspondence admitted, with the exception of one letter, to be genuine; and that relating to the production of the *expediente* of the

mine, in great part presented by the defendants themselves. The examination has been prosecuted not with a view of reaching any conclusion upon the question involved, but merely to ascertain whether the allegations of fraud in the bill which are not positively denied by the answer, have such a probable foundation as to justify the court in interfering by injunction, to preserve the property during the investigation in which the validity of the title will finally be determined.

The results of the examination may briefly be recapitulated as follows:

It appears from the letters of the defendants, or those under whom they claim, that in the years 1847, 1848, 1849, and 1850, plans were discussed, and the design was entertained to procure documents from Mexico, the dates of which were to be "arranged" by Castillero, and which were to be "*placed in the proper governmental custody in Mexico*," and certified copies of which were to be sent on. That in May, 1850, Mr. Barron and Castillero proceeded to Mexico, "to attend to what had been recommended" by James Alexander Forbes.

That documents have since been produced "from the proper governmental custody in Mexico," which are claimed to be a grant of two leagues of land and ratification of the mining possession. That these documents are not attested by the great seal of Mexico, or officially authenticated and recognized as genuine by the political power of that country. That they are dated subsequently to the 13th of May, 1846; and that the Mexican commissioners solemnly and repeatedly declared to the government of the United States, that no grants whatever of lands had been made in the territory of California since that date. That in December, 1849, two documents, of nearly similar import, appear to have been in existence; both of which could not have been genuine. That

the original of one of these, which was deposited in Monterey, has disappeared; while the other is authenticated by the certificate of a notary obtained, as it recites, at the instance of some of the defendants, nearly every statement of which is untrue. That the *expediente* of the mine originally produced, and which was by Alexander Forbes procured, to be certified by Weekes, to be a "faithful copy to the letter" of the *expediente* on file in his office is not a copy of the document since produced from that office.

That this last document was not discovered until 1851, and up to that time its existence seems to have been unknown to those of the defendants who were most likely to have known of it, and to their agent and attorneys.

That no measurement of the land alleged to have been granted by the alcalde, or demarkation of its boundaries, was effected during the continuance of the Mexican authority in this country; but the possession of the mine itself, which had been kept up with occasional interruptions, by Indian workmen, was transferred after the occupation of the country, to the British vice-consul, in order to place it under cover of the protection of the English government. That the first formal possession, by metes and bounds, of the tract now held by defendants, was taken long after the occupation of California by the American forces, and after the title of the United States had accrued. That at the time this possession was taken, the existence of valuable ores on the land was studiously concealed; and that two leagues of land were subsequently taken possession of and inclosed by the defendants without any authority whatever.

It further appears that the United States are now seized of the legal title of the land, and that the title of the defendants, assuming it to be a genuine but an imperfect or equitable title,

is one the validity of which, under the Mexican mining and colonization laws, is open to grave doubts. All these circumstances are, in our opinion, abundantly sufficient to show, not only that there is a substantial ground of controversy between the parties, but that the allegations of fraud in the bill, which are met with no positive denial in the answers, are sustained by proofs of the fraudulent designs of the parties, and of the manner in which the documents are produced, which leave the question of their genuineness open to grave doubts.

In such a case, where the substance of the estate and that which constitutes its chief value, is being wasted and carried off in enormous quantities, and where the threatened injury is to an extent far greater than can be compensated by damages, it seems to us clearly the duty of the court to preserve the property pending the litigation by which the right to it will be determined.

P. Della Torre, District Attorney.

Edmund Randolph and E. H. Stanton, for the United States.

A. C. Peachey and Gregory Yale, for defendants.

LORING *v.* DOWNER.

Circuit Court, U. S., July Term, 1858.

An equitable right cannot be enforced in a common-law *form*, and as a legal right, on the equity side of this court.

The distinction between the enforcement of legal rights and the pursuit of equitable remedies in the Circuit Court, United States, is well defined by law, and must be maintained.

The right sought in this case is equitable; the removal of a cloud from title; and should therefore have been enforced on the equity side of this court.

The case was originally brought in the District Court of the United States for the Northern District of the State of California, when that court was in the exercise of the powers of a Circuit Court of the United States.

On a *demurrer* filed in that court to the complaint, the objection to the jurisdiction of the court raised by the *demurrer* was overruled.

Subsequently, under a recent act of congress organizing this tribunal, the case has been transferred to this court; who having ordered a re-argument, the case now comes before it on *bill* and *demurrer*.

The following in *totidem verbis* is a copy of the complaint filed in the District Court of the United States for the North-

ern District of the State of California, with exception of the description of the property:—

SAMUEL C. LORING
v.
GEORGE DOWNER. } *At common law.*

Samuel C. Loring, who is a citizen of the State of Massachusetts, complains of the defendant, who is a minor over fourteen years of age, and citizen of the State of California residing in said district. For that the plaintiff is seized and possessed of [certain real estate described in the complaint], and that the defendant claims an estate or interest in said real estate adverse to the plaintiff which is invalid, but which is wrongfully used by the defendant to annoy and harass the plaintiff's enjoyment of said real property and to obstruct and prevent the free use and disposition of the same. Wherefore, the plaintiff prays that the defendant may be summoned to answer, that a guardian may be appointed by the court, that the defendant may be required to disclaim, or produce such claim, estate, or interest; that the same may be duly determined by the judgment of this court according to the statutes of this State.

MCALLISTER, J.—The complaint professes in its caption to be a common-law pleading. The defendant so treats it, and both parties so consider it.

In the brief of plaintiff's counsel it is stated, "This action is a proceeding at law, the right to be tried is a legal right, as much so as if the defendant had of his own independent motion commenced an action of ejectment against the adverse party, to recover the possession of the premises. After the

defendant pleads (which pleading, on his part is in the nature of a declaration), the whole proceeding is but an inverted action of ejectment.

The court also considers it a common-law proceeding. It partakes of none of the features which characterize a bill in chancery, and, *ex concessis* of the parties, is to be tried at common law by a jury, according to the principles of an ejectment suit. If this proceeding be purely a proceeding at common law, the question which arises *in limine* is, what is the nature of the remedy sought through its instrumentality? If it be an equitable one purely, then is its fate determined by the 56th rule of this court, which after prescribing that the practice and forms in this court shall, so far as is not provided for by the rules of this court, or by the acts of congress of the United States, conform to those prescribed by certain acts of the legislature of this State therein referred to, closes with the *proviso*, "that nothing in either of said acts shall be so construed as to authorize the enforcement of a merely equitable right by any action or proceeding on the common-law side of this court."

This rule but reiterates a doctrine arising out of the organization of this court, under the laws and constitution of the United States. In *Robinson* v. *Campbell* (3 Wheaton, 222), it is said, "The acts of congress have distinguished between remedies at common law, and in equity. . . . The court, therefore, think, that to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be at common law or in equity, not according to the practice of the State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles."

That case enunciates the principle that if State laws have given a legal remedy founded on an equitable title, the equity jurisdiction of the Circuit Court is not affected thereby.

In *Boyle* v. *Zacharie & Turner* (6 Peters, 658), we find that the chancery jurisdiction given by the constitution and laws of the United States, is the same in every State of the Union, and the rule of decision is the same in all. "And the settled doctrine of this court, is, that the remedies in equity are to be administered, not according to the State practice, but according to the practice of courts of equity in the parent country, as contra-distinguished from that of courts of law. In *U. S.* v. *Howland* (4 Wheaton, 115), it is said, "And as the courts of the Union have a chancery jurisdiction in every State, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other States." The court, therefore, decided in that case, that the chancery jurisdiction was not affected by a law of that State which provided a peculiar process for a party.

In *Livingston* v. *Story* (9 Peters, 632), it was decided, that a federal court in Louisiana, ought to proceed in equity according to the same principles, rules, and usages as the other Circuit Courts administered it; and it made no difference whether there were, or were not, courts in the State administering equity law.

In *Bennett* v. *Butterworth* (11 Howard, 674), carried to the Supreme Court from the District Court, U. S., for the District of Texas, Taney, C. J., says, "Whatever may be the laws of Texas, they do not govern the proceedings and practice in the courts of the United States; and although the forms of proceedings and practice in the State Courts have been adopted in the District Court, yet the adoption of the State practice must not be understood as confounding the principles of law

and equity, nor as authorizing legal and equitable claims to be blended together in one suit. The constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity; and a party who claims a legal title, must proceed at law, and may undoubtedly proceed according to the forms and practice in such cases in the State courts. But if the claim is an equitable one, he must proceed according to the rules this court has prescribed (under the authority of the act of congress, 23d August, 1842), regulating proceedings in equity."

In *McFaul* v. *Ramsey* (20 Howard, 526), the court cites approvingly the immediately preceding case, and say, "In those States where the courts of the United States administer the common law, they cannot adopt these novel inventions which propose to amalgamate law and equity, by enacting a hybrid system of pleadings, unsuited to the administration of either."

The foregoing authorities enunciate the following propositions.

1. That the constitution and laws of the United States create a distinction between legal and equitable rights, and they must be administered on the common-law and equity sides of this court respectively.

2. That the distinction between the two must be preserved in every State, even where no court of chancery exists.

3. That if a legal remedy is given by a state law for an equitable right, such fact does not affect the equity jurisdiction of the federal courts.

The inference from the last proposition is, that if a legal remedy has been given by a state law for an equitable right, the equity jurisdiction of the federal courts, being unaffected by it, must be maintained. I know of no exception to the rule, unless it is to be found in some cases in which an equitable

title has been declared by state statutes to be legal, and in which it has been decided that upon such titles actions of ejectment may be sustained. Such exceptions are doubtless owing to the construction placed upon the 34th section of the judiciary act, adopting the laws of the several States as rules of decision in the courts of the United States in common-law cases.

We come now to the character and nature of the remedy sought to be enforced in this case. The right given by the legislature, on which the present proceeding rests, is the right to any one in possession of real estate to institute an action to determine any adverse claim of another to said real estate. As to the policy or propriety of that legislation, this court has nothing to say. In the courts of this State, by the practice act, one form of action is prescribed in all cases, whether common law, in equity, or in the admiralty. The courts, however, have been forced, by the very reason of the thing, to create practically those differences which the nature of things create, and which legislative theory cannot annul.

In *McFaul* v. *Ramsey* (20 Howard, 525), the court say, "But this attempt to abolish species, and establish a single *genus*, is found to be beyond the power of legislative omnipotence. They cannot compel the human mind *not* to distinguish between things that differ." There will be found, on examination of the decisions of our State courts, a practical illustration of the justness of foregoing remarks of the Supreme Court of the United States. If a party goes into a State court, he has to enter it with one form of action, whatever be the nature of his right, or the character of the remedy he seeks. But he finds practically that the remedy he seeks is administered according to the rules of equity or common law, just in proportion as it is legal or equitable. This must necessarily be in the nature of things.

In *Minturn* v. *Hays* (2 Cal. 593), our Supreme Court says, "Although in this State there is no separate *forum* for the adjudication of chancery cases, yet in our courts having chancery jurisdiction, the rules and principles of equity practice remained unaltered."

In *Guy* v. *Hammond* (January Term, 1858), they decide that in chancery cases parties are not entitled to juries. They have entertained jurisdiction over bills *quia timet*, bills for the cancellation of deeds, bills to remove clouds upon titles, to enjoin sales, and for many other purposes.

In the case of the *Merced Mining Co.* v. *Fremont* (7 Cal. 320), the section of the practice act of this State upon which the present proceeding has taken place, came under consideration. In whatever form the proceeding was presented to the court, it is evident it was considered and decided by the principles of equity jurisprudence. Speaking of their power to issue an injunction, they ask, "Is not an injunction *pendente lite* a remedial favorite in equity?" When, then, the State courts possessing under the same forms of pleading a mingled jurisdiction of common law and equity, are constrained by the necessity of the case to distinguish between the principles of the two systems in the administration of justice, how can this tribunal, bound by the constitution and laws of the country, confound them? It is not a formal, but a substantial difference which exists between a common-law proceeding and a proceeding in equity in this court, and they are followed by different results. If this proceeding is taken cognizance of by this tribunal, it could not, bound as it is to recognize the distinction between common law and equity, permit any equitable title of defendant to be given in evidence; whereas, in the State courts, who recognize no such distinction, the equities of defendant might prevail over a legal title, as it might also, if the plaintiff had invoked the equity powers of this court.

But it is contended that the present proceeding is nothing more than an "inverted ejectment," a common-law remedy asserting a common-law right.

In *Surgett* v. *Lapice et al.* (8 Howard, 65), the court, commenting upon another case, say in relation to it, "But that was not an action of title to quiet the plaintiff in possession of his land, but was a petitory action brought by the United States to recover land which was in possession of the defendant, and to which the United States claimed a legal title. The suit was in the nature of an ejectment, and in no respect analogous to a proceeding in equity to remove a cloud from the title of a party, who not only holds the legal title, but is also actually in possession of the land in dispute," &c.

Now, the complaint in this case alleges the plaintiff to be seized and in possession of real estate, to which defendant claims an adverse title, which it charges to be adverse and wrongfully used by defendant to annoy and harass the plaintiff's enjoyment of said real estate, and to obstruct and prevent the free use and disposition of the same; and prays, among other things, that the defendant may be required to disclaim or produce his adverse claim, that the same may be determined. If this is not a proceeding in the nature of a bill *quia timet* to quiet possession, and remove a cloud from title, it is difficult to classify it.

It is also urged, that the legislature of this State has converted the right prosecuted into a cause of legal action, and therefore this court is bound so to consider it. The legislature does not touch the title or alter its character. It simply authorizes the party to litigate it. How is this to be done? By a resort to the appropriate tribunals. If his right be a legal one, by going into a common-law court; if equitable, by invoking the powers of a court of equity, if he makes an appeal to the

federal court. We have seen, that this proceeding is substantially instituted for the vindication of equitable rights; that it seeks to quiet possession—to remove a cloud from title; and asks such action from this court as will dispose of defendant's title, and prevent him from using it to harass and annoy the complainant. That such proceeding is one which is for a court of equity, is manifest by the decisions of the Supreme Court. In *Clark* v. *Smith* (13 Peters, 195), that tribunal administered a statute of Kentucky, very similar to that under which complainant is proceeding, in the exercise of its equitable jurisdiction. This they could not have done, had they supposed the proceeding a common-law one, brought to enforce a mere legal title. In *Wickliffe* v. *Owings* (17 Howard, 47), a similar action took place; and the court rested the right of the plaintiff to recover, upon the general principles of equity, as well as on the statute of Kentucky.

The last ground taken against the demurrer, and to prove this proceeding as perfectly proper in a court of common law, is that there existed at common law writs issued to prevent possible mischief, and known as "*Brevia participantia*," which are enumerated by Lord Coke; and it is contended, that this fact shows that the administration of precautionary justice was never limited to courts of equity. There is no doubt that before the limits between law and equity, and, indeed, before the modern system of equity had existed, such writs did issue. Story, in his treatise, alludes to the fact. One of these writs was that of "*Ne injuste vexes*;" to which, it is suggested, the procedure in this case may be assimilated. No instance is given of their present vitality; and it is matter of serious doubt, whether the old common-law writs of *Mesne*, *Warrantia Charta*, *Monstraverant*, *Curia Claudelia*, and *Ne injuste vexes*, or any other of the six writs enumerated by

Judge Story, existed as part of the common law, when adopted by this State in 1850. It is clear, the authorities heretofore cited, did not recognize them as part of that law, previous to that period. *Willard*, in his treatise on equity (p. 328), enumerates these relics of the olden time, and says, "These remedies have been so long antiquated, that but few traces of their former existence remain. In modern times, courts of equity have administered relief in the foregoing and many other instances, and arrested the commission of anticipated injuries, by the bill *quia timet*." (25 Wend. 132; 5 Paige Ch. R. 493.)

Whenever the equitable powers of this court shall be invoked in a case like the present, an inquiry into its merits will be appropriate.

The *demurrer* in this case must be sustained, and an order to that effect entered upon the minutes of the court.

Sloan, Brosnan & Groat, for plaintiffs.
Joseph B. Wells, for defendant.

MINTURN *v.* LARUE *et al.*

Circuit Court, U. S., July Term, 1858.

Equity will protect by injunction a statutory right, where the title of complainant is free from doubt.

Where the legislature has granted the franchise of constructing and keeping a ferry, no powers will be construed to have been given by implication, unless of a direct character.

None not so derived will be conceded, except by the express language of the law.

A monopoly will never be awarded except by implication of a most direct and immediate character, and as necessarily annexed to powers expressly granted.

The bill in this case was filed praying for an injunction to restrain the defendants from infringing upon an alleged exclusive franchise of the complainant in a ferry between the town of Oakland and the city of San Francisco.

McAllister, J.—The bill in this case is exhibited in behalf of Edward Minturn, a citizen of the State of New York, who alleges himself to be the proprietor of a ferry established across the Bay of San Francisco, with its *termini* at the town of Oakland and the city of San Francisco. The bill prays for an injunction against the defendants, who, it is alleged, are infringing the exclusive privileges which complainant claims to hold in the said ferry.

A motion is made upon the bill and affidavits filed by both parties, for the issue of the writ prayed for. In the affidavits of both parties are introduced matters collateral to the merits, and which cannot be subjects of legitimate consideration in the discussion of this case. Instead of being distinct affirmations or denials of facts material to the issue, they are argumentative, denunciatory, and partake more of the character of written discussions, than of sworn statements of facts constituting the true merits of the cause. Perhaps the appropriate course would have been for the court to have suppressed them as tending to introduce confusion, and constitute a dangerous precedent in the practice of a court of chancery. But as neither party moved for their suppression, content with calling the attention of the court to the character of these documents, it was agreed by both parties that the affidavits should be read; the propriety of the admission of them, or portions of them, discussed on the final argument of the motion, and the disposition of them left to the court. Now, there is a large proportion of these documents the court feels bound to discard from its consideration. Whether the charter of the town of Oakland was obtained by fraudulent practices from the legislature of this State? Whether the ordinance of the trustees of the town of Oakland, passed for the establishment of the ferry, was the result of conspiracy? Whether the contract between the town of Oakland and Carpentier, the assignor of complainant, was the offspring of fraudulent connivance? Whether the ferry has been so grossly mismanaged as to constitute an imposition on the public? Whether the proprietorship of the ferry has been a source of profit or not? Whether all good citizens demand that the monopoly of complainant should be arrested? Whether public opinion among the citizens of Oakland emphatically requires it to be done?

These matters, and all akin to them which have been embodied in the affidavits, or directly intimated in them, must be disregarded, and this case decided by an application of well-settled legal principles to the issue made. The complainant asks for the extraordinary interposition of this court for the protection of what he considers a legal statutory right; and if given, it must be by the application of principles, independent of all other considerations.

He claims as assignee of one Charles Minturn, himself the assignee of one Edward R. Carpentier, who is the alleged grantee of the ferry from the town of Oakland.

The defendants, independently of the defects alleged by them to exist in the title of the complainant, set up by way of defense, a claim under a direct transfer to them of the premises in dispute, from the town of Oakland, subsequent in date to the assignment to complainant by Charles Minturn. They also set up as a defense, the fact, that the steamer they are running has been duly licensed and enrolled for the coasting trade, under the laws of the United States, and as such is entitled to navigate the waters of the bay of San Francisco. In the view the court entertains of this case, it will be unnecessary to investigate the character of this latter defense.

The complainant Minturn, contends that the documentary title exhibited, vested in him an exclusive privilege to the ferry for the term of twenty years from the date of the contract between the town of Oakland and the said Carpentier. That such contract, under which he claims, vested in him such an interest as excludes any one from the right to run a boat on the route between the city of San Francisco and the town of Oakland, and concludes the town of Oakland from conferring on any one the right to do so during the period of time said contract shall exist. He further contends, that he has exhibited

a prima-facie case, and that it entitles him to an injunction; that the court will not look to the extent and validity of the complainant's title, but postpone the consideration of them to a future stage of the case. There is a class of cases where the court will, although not satisfied with, but entertaining doubt as to the complainant's title, grant an injunction forthwith, before answer. But this is done to prevent irreparable mischief. Where the injury sought to be enjoined, is the transfer of negotiable paper by an irresponsible party; a destructive trespass to the inheritance; the repetition of a nuisance, or the commission of some act not reparable in damages, the court *ex necessitate* will order an injunction to keep the parties in *statu quo* until its doubts have been removed by the facts elicited in the future investigation of the cause. This is not such a case. The title of the complainant is set forth in his documentary proof; and all the materials for its investigation by ascertaining their legal effect, are before the court. It involves no inquiry into complicated facts. It depends alone upon the construction of the charter which gave it birth. Why should the court decline to pass upon it, but postpone the investigation into the construction of it, intermediately enjoining the adverse party from running their boat?

The complainant asks for an injunction to enjoin from the alleged infringement of what he claims to be his statutory right. Now, the power of this court to interpose, depends upon the fact that his right is *clear and without doubt*, his possession actual, and *when his legal title is not put in doubt.* (1 Johns. Ch. Rep. 611.)

In *Livingston* v. *Van Ingen*, (9 Johns. 585), Chancellor Kent says, "Injunctions are always granted to secure the enjoyment of statute privileges of which the party is in the *actual possession*, unless the right be doubtful." The same doctrine, that

before the court will interfere by injunction the right of the complainant should be *free from doubt*, is enunciated by Savage, C. J., in *Steamboat Co.* v. *Livingston* (3 Cowen, 755.)

It may be therefore assumed that the right of the complainant must be legal, clear, and beyond reasonable doubt. The question, then, into its validity and extent becomes not only a necessary but preliminary inquiry to the issue of an injunction.

Now, the source of complainant's title is to be found in the charter of the town of Oakland. He claims under assignment from Edward B. Carpentier, grantee of that town. No interest could pass from the latter to its grantee save what was vested in it by its charter, and none other could pass from it to the grantee under whom complainant claims, whatever may be the terms of the instrument executed by them.

As to the character of this interest it must be that of a vested interest, or property; or it is a franchise; or lastly, it may be termed, as characterized by one of the solicitors for the complainant, "a legislative power." The decisions of the New York courts upon the interest conveyed to the city of New York in the ferries which cluster around it, are based upon the transfers made of them to it by the old charter of the British Crown, and the legislature, from time to time, of the State of New York. These transfers are alienations containing all the operative words of conveyance known to deeds transferring the fee in real estate; and their legal effect is fixed by well settled principles. Those New-York decisions can, therefore, afford no proper guide in the construction of the Oakland charter. In fact it was not contended in the argument that any *property* in the ferry was vested in the town of Oakland by its charter, as was the case in New York. One of the solicitors for complainant contended that although no *property*

was conveyed, a franchise was transferred; and the other affirmed that something more than a franchise passed, and termed it a "legislative power." The court considers it a mere naked, incorporeal right. It is created by law; exists only in contemplation of law. It is invisible, intangible, and incapable of a physical possession, and depends on the law for its protection. (2 Gray, 27.)

But whatever be the interest that passed, its nature and extent must be ascertained in order to see if the title of complainant be so free from doubt as to authorize the court to interfere by injunction. The charter of Oakland is a public grant for the establishment and regulation of ferries across navigable streams, is a subject within the control of government, and is not matter of private right. In the construction of such a grant, designed by the sovereign power making it to be a general benefit and accommodation to the public, the rule is, that if the meaning of the words be doubtful they shall be taken most strongly against the grantee and for the government, and therefore should not be extended by implication beyond the natural and obvious meaning of the words, and if these do not support the right claimed, it must fall. (*Mills* v. *St. Clair Co.*, 8 Howard, 569.)

In such a grant nothing passes but what is granted in clear and explicit terms. And neither the right of taxation, nor any other power of sovereignty which the community have an interest in preserving undiminished, will be held by the court to be surrendered unless the intention to surrender is manifested by words too plain to be mistaken. (*Ohio Life Insurance Co.* v. *Debolt*, 16 Howard, 435.) In *Beaty* v. *Lessee of Knowler* (4 Peters, 168), the court say, "That a corporation is strictly limited to the exercise of those powers which are specifically conferred on it, will not be denied."

In the *Charles River Bridge* case (11 Peters, 548), it is said "when" a corporation alleges that a state has surrendered for seventy years its power of improvement and public accommodation in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist in the language of this court above quoted "that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear."

In that case the principle was applied to the charter given, to the proprietors of a bridge, by the State of Massachusetts. The court say in relation to the charter, "It is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation for the purpose of building the bridge, and establishes certain rates of toll which the company are authorized to take. . . . There is no exclusive privilege to them. . . . No engagement from the State that another shall not be erected; and no undertaking not to sanction competition, nor to make improvements that may diminish the amount of its income. Upon all these subjects the charter is silent, and nothing is said in it about a line of travel, so much insisted on in the argument, in which they are to have exclusive privileges. No words are used from which an intention to grant any of these rights can be inferred. If the plaintiff is entitled to them it must be implied simply from the nature of the grant, and cannot be inferred from the words by which the grant is made. . . . All the franchises and rights of property enumerated in the charter, and there mentioned to have been granted to it, remain unimpaired. But its income is destroyed by the Warren bridge, which, being free, draws off the passengers and property which would have gone over it and ren-

ders their franchise of no value. This is the gist of the complaint. . . . In order, then, to entitle themselves to relief, it is necessary to show that the legislature contracted not to do the act of which they complain, and that they impaired, in other words violated, that contract by the erection of the Warren bridge." The court then proceed to decide that no contract of the kind arose out of the words of the charter, and consequently by the erection of the Warren bridge no violation of any contract made with the proprietors of the existing bridge had taken place. (11 Peters, 549.)

The case of *Fanning* v. *Gregoire* (16 Howard, 524), is an instructive one on this point. The complainant stated that he had been authorized by an act of the State legislature, framed in 1838, to establish and keep a ferry for the term of twenty years, and that by the terms of the act it was provided that no court or board of commissioners should authorize any other person to keep a ferry within the limits; and the bill prayed for an injunction against the defendants. These latter defended on the ground, that under a contract made with the city of Dubuque, within the limits of which the ferries were situated, they (the contract bearing date in 1852) were running their boat, which did not interfere with the right of the plaintiff other than such interference as is the necessary result of a fair competition. It was contended by complainant that the privilege conferred on him was *exclusive;* that the right had been given to him and *his heirs* for twenty years; that an ordinary license is not granted to a man and his *heirs;* that it was provided in the act "that no court or board of county commissioners shall authorize any other person (unless as is hereinafter provided by this act) to keep a ferry within the limits of the town of Dubuque."

In reply to all this the court decided that the grant to com-

plainant was *not exclusive.* As to the last suggestion of complainant the court say, "The prohibition on a court and the board of county commissioners to grant a license for another ferry, it is urged would show an intent to make the grant exclusive. And that the reason for this might be found in the alleged fact that when the ferry was first established a considerable expenditure was required and little or no profit was realized for some years." But all the judges present, except one, held that the grant was not intended to be exclusive. In that case the court below had refused the injunction and dismissed the petition, and the judgment was affirmed by the Supreme Court. (16 Howard, 533.)

The case of *Thacher* v. *Dartmouth Bridge Co.* (18 Pick. 501), is a strong illustration of this doctrine. The act of incorporation under which defendants were authorized to erect their bridge did not provide any mode of ascertaining or paying the damage which any individual owner of land might sustain by the appropriation of his property. It was urged by defendants that without the exercise of such power the bridge could not be erected. But the court considered the consent of owners might be obtained by gift or purchase; at all events it would not give the power by implication. It deemed that where the legislature, in the exercise of high sovereign power, intended to confer such a power upon a corporation, they do it in express terms, or by necessary implication. It is not to be presumed that such a power is intended to be granted unless the intent to do so can be clearly discovered in the act itself. In the present case there is no such power in terms, and we think there is none by implication. (18 Pick. 501; 16 How. 534.)

The foregoing authorities establish the canons of construction that must be applied to the charter of Oakland.

As to its language. The clause in it on which complainant relies gives to the trustees of Oakland *power* to do many things, and among them *power* "to lay out, make, open, widen, regulate and keep in repair all streets, roads, bridges, *ferries*, public grounds and places, wharves, docks, piers, sewers, wells and alleys, and to authorize the construction of the same; and with a view to facilitate the construction of wharves and other improvements, the lands lying within the limits aforesaid between high tide and the channel, are hereby granted and released to said town,"

The first observation to be made on this charter may be embodied, *mutatis mutandis*, in the language of the Supreme Court of the United States, in the case already cited (11 Peters, 545). It (the charter) confers on them the ordinary facilities for the purpose of constructing a ferry. There is no exclusive privilege which they are entitled to bestow. There is no engagement from the State, that another ferry should not be erected. Nor is there an undertaking not to sanction competition, nor to make improvements that may diminish the amount of the income of any ferry that might be constructed. Upon all these subjects, the charter is silent. If the plaintiff is entitled to them, it must be implied from the nature of the grant, and cannot be implied from the words by which the grant is made. All the franchises, and rights of property in the charter mentioned, is the right of constructing ferries, and still remain. But its income is destroyed, or diminished, by the additional facilities afforded by defendants, for transportation and travel. This is the gist of the complaint. In order to entitle plaintiff to relief, it is necessary to show that the legislature in this charter contracted not to do the act he complained of, or that the town of Oakland was authorized to make the contract; or, in other words, that the contract has been violated. The fore-

going language of the Supreme Court, U. S. (with slight alterations), settles the principle that the complainant can only obtain relief on a contract; that none such arose out of the words of the act of the legislature, and it could not be raised by implication from the nature of a public grant.

But again, the manner in which the legislature uses terms of conveyance, shows that they had an understanding of their legal effect. When they propose to convey certain lands described, they indicate their intention by using the operating words of "grant and release;" when they propose to confer certain municipal franchises, they state simply that the *power* to exercise them is conferred upon the town.

It is urged, that the delegation of a power to make, regulate, and construct ferries, gives an implied power to create exclusive privileges; and it is pressed as a reason for this implication, that at the first construction of the ferry, it demanded a large expenditure, and was for a long time a source of little profit. We have seen that in a public grant, no inference can be made from the supposed nature of the grant, and that if the right of plaintiff is not sustained by clear and obvious words, in the language of Chancellor Kent, "without doubt," the right must fall.

A similar argument as to original cost was raised in the case of *Fanning* v. *Gregoire* (16 Howard, 524), and was not deemed entitled to consideration. When the ordinary power of constructing ferries across the navigable waters of the bay, in any direction from Oakland, was conferred on its authorities, it would be a violation of the rules of construction of public grants, to decide that the legislature intended to confer their whole power upon the corporation, and thus preclude themselves from all future opportunities of public improvement. It cannot be considered that the power to grant exclusive privi-

leges to an individual, for nearly a quarter of a century, is to be regarded as belonging to the town by implication.

This would be a most extraordinary construction, when we regard the uniform policy of this State, from the earliest law regulating ferries, as manifested upon the statute-book. Anterior to 1855, the regulation of ferries was confided to the courts of sessions. The Supreme Court of this State having decided, that the law conferring the power upon those tribunals was unconstitutional, the legislature committed the power to supervisors.

It is contended that the laws prior to 1855 being unconstitional, the grant to the town of Oakland cannot be considered as made in subordination to those general laws, and are free from their restrictions. This may be true; still, when we look to the character of these laws, they stand on the statute-book, and serve to show the restrictive and cautious policy of the legislature in relation to ferries. They were only authorized to be established for a short period of time, under various restrictions; and, in no instance did the legislature exclude themselves from establishing additional ones, when public convenience should require it. This uniform policy of our legisture is to be kept in view, when the question arises whether, in the absence of express words and obvious natural language, it is to be *presumed* to have departed from such policy, and to have bestowed on the town of Oakland the right to grant exclusive privileges, and thus preclude all future intervention on the part of the legislature, even over waters navigable to the ocean.

The legislature could not have supposed they had done so when, in less than twelve months afterwards, they passed an act in relation to ferries, in which they repealed the second section of the act creating public ferries, passed 18th March,

1850, as applied to certain bays (among them that of San Francisco), within the limits of the State or their shores, and repealing so much of said section as could be so construed; and enacting that the navigation of said bays, and the transportation of freight or passengers across, through, and over the same, should be free and exempt from the restriction of any ferry-laws now in force in this State.

That the legislature had the right to keep the navigation of the bay within the limits of the State, and the transportation across them free and exempt from the restriction of any ferry-laws in force, we think cannot be doubted. For this court to interpose by an injunction to restrain parties from navigating across the Bay of San Francisco, on the ground that they were infringing upon the exclusive privileges of a ferry, in the face of a statute of the State which declares that such bay shall be exempt from all ferry restriction, would be an improper exercise of power.

It is urged that, admitting it was in the power of the legislature to alter, modify, or take back the administrative-legislative power conferred by the charter, still, when private rights have issued out of the exercise of such power by the town of Oakland, they cannot be affected by the repealing action of the legislature. This view assumes that the contract between the town of Oakland and Carpentier, did invest him with a property in the ferry, and legally transferred to him an exclusive right for twenty years. The authorities cited, and the reasoning predicated upon them, tend to show that nothing but a legislative or administrative power was transferred, and *that* limited to the ordinary construction of a ferry, not authorizing the authorities of Oakland to give a monopoly of it to any one. Such contract, therefore, could not pass such exclusive

privileges to a private individual as would paralyze any future action of the legislature.

That private rights might arise from the legitimate exercise, by the town of Oakland, of its corporate privileges, there is no doubt; and the repeal of those privileges by the legislature might not affect those rights. To illustrate, the charter gives to the town of Oakland the power of selling or otherwise disposing of its *common property*. In the exercise of that corporate right, private rights might arise, and a subsequent repeal by the legislature of the corporate privileges of the town, would not defeat the previously vested private rights of the individual. So far from such right having vested in Carpentier, under the contract between him and the town of Oakland, even if the latter had made a grant of the ferry with covenants for the exclusive enjoyment of the franchise granted, this would not have restricted them from exercising the power conferred on them by the charter to construct additional ferries. Such authority was vested in them as trustees for the public, and cannot be restrained by the covenant of the city. In constructing ferries, the authorities of Oakland were acting under a statute in the exercise of which the public had an interest. The city of Oakland was not the owner of the ferry, nor of an exclusive franchise; and although it may have granted it with a covenant for quiet enjoyment, and might be responsible on such covenant to the grantee, still, such covenant could not restrain the authorities of Oakland from exercising their judgment in creating additional ferries, as in their opinion the public interest should require. (*Fay, Petitioner, etc.* 15 Pick. 252.)

But the contract between the town of Oakland and Carpentier, must be deemed a fraud upon the law, and a complete evasion of its policy and object. A public trust was confided

to the authorities of Oakland, to be executed by them as agents of the public. It was not in their power to denude themselves of the trust. It was not their "common property," and, by the charter, could not be sold or disposed of. It was a public trust, to be exercised by them as agents of the community, which they could not discard so as to prevent their successors from establishing additional ferries required by the public convenience. By the contract they *granted*, *sold*, *released*, and *conveyed* to an individual, his successors and assigns, exclusively, for the space of twenty years, the right to keep and run a public ferry or ferries, so as to demand and receive compensation therefor, between the town of Oakland and the city of San Francisco, and between *the said town and any other place*, together with all and singular the ferry-rights, privileges, and franchises, which now are or may hereafter be held and owned by said town. By such contract the then authorities of Oakland attempted to convert a public trust to private and individual use, and to place for twenty years under the exclusive control of an individual and his assigns, all, even future, means of ferry communication across the navigable waters from Oakland to any other place. Such never was the intention of the legislature. Such an act, it was not in the power of the authorities of Oakland to do, and such a transaction a court of equity cannot sustain.

This tribunal could not interpose by the extraordinary process of an injunction to support rights derived from such a source; and maintain a title, which so far from being free from doubt, was executed under a contract in fraud of the law under which it professes to be executed; and to sustain restrictions over the navigable waters of this State, which the legislature has declared shall be exempt from all such restrictions.

HOFFMAN, J.—The bill in this case is filed for an injunction to restrain the defendants from interfering with the privilege or franchise of the complainant in a ferry from the town of Oakland to this city, of which he claims to be the exclusive owner for a term of years.

This franchise is alleged to have been conferred on the complainant by an ordinance, and contract pursuant thereto, made by the trustees of Oakland, in the year 185–. The authority of the trustees to make the ordinance and contract is derived from the act of the legislature, passed May 4, 1852.

Under the supposed authority of this act, a contract was made by the trustees, granting to the assignor of the complainant the privilege, claimed to be exclusive, of keeping and running all ferries between the town of Oakland and the city of San Francisco and elsewhere. It is not denied that the defendants are running a ferry-boat between this city and the town of San Antonio, touching at Oakland; nor that the profits and business of the complainants are seriously affected thereby. It is urged that the court should not at this stage of the cause, determine its whole merits, but that the injunction should be granted if the complainant has made out a prima-facie case.

But it is well settled that injunctions will not be granted to secure the enjoyment of a statutory privilege, unless the right be clear. (3 Cowen, 755; 1 Johns. Ch. R. 611.)

In cases where an injunction is prayed to restrain an act which, if committed, will work irreparable mischief, it will be granted *ex necessitate*, even in doubtful cases, as the only means of keeping the parties in *statu quo*, and preventing the final decree from being abortive. Such are, the cases of the

threatened destruction of heir-looms or works of art, or objects having a *pretium affectionis*—like family portraits, &c., or the publication of private letters, or the erecting of nuisances calculated to work irreparable mischief, &c. In all such cases, it is clear that if the court, by refusing the injunction, permits the act to be done, its subsequent decree granting the injunction would be but a *brutum fulmen.*

But when an exclusive privilege under a statute is claimed, and the court is asked to forbid the commission of an act, otherwise lawful, because it interferes with the exclusive privilege claimed, the legal right of the complainant must be clear. It is said that in this case the court should interfere because the trespasses on the complainant are continuous and cannot be estimated in damages.

But the damage to the defendants, if they are prevented from running their boat until their cause is heard, are equally unsusceptible of calculation, and may be far greater than the complainant can sustain by the competition. The court should therefore be fully satisfied that the right exists before, by its injunction, it will cause to the defendants an injury quite as irreparable, and perhaps more extensive, than that apprehended by the complainant.

The supposed authority of the trustees to make the ordinance and contract relied on by complainant, is contained in the third section of the act to incorporate the town of Oakland, passed May 4th, 1854. This section provides "that the board of trustees shall have power to make such by-laws and ordinances as they may deem fit, proper, and necessary; to regulate, improve, sell, or otherwise dispose of the common property; to prevent and extinguish fires; to lay out, make, open, widen, regulate, and keep in repair, all streets, roads, bridges, ferries, public places and grounds, wharves, docks, piers, slips, sewers,

wells, and alleys, and to authorize the construction of the same; and with a view to facilitate the construction of wharves, and other improvements, the lands lying within the limits aforesaid, between high tide and ship-channel, are hereby granted and released to said town."

It is not claimed that the foregoing provisions constituted a grant to the town of Oakland, of all ferries from that town, as property.

It is urged, however, that they amount to a delegation to the trustees of all the legislative and sovereign power possessed by the State over the subject of ferries from that town. That in the exercise of that power, the trustees could make any contract, and confer any rights with regard to ferries, they might deem proper, and that having done so, the rights thereby conferred, vested, and remain indefeasible, either by the trustees or the State, except in the exercise of the right of eminent domain.

The first question to be considered is, What were the nature and extent of the authority conferred upon the trustees by the act above cited?

The only words in the clause which can be construed to confer the powers supposed, are the words "make" and "authorize the construction of."

It is evident that most of the empowering words in the phrase do not apply to all the objects in reference to which the powers are to be exercised. For instance: the word "open" cannot refer to "ferries," nor the word "widen" to "wells." The words "lay out," evidently refer to "streets," "roads," "public places," and "grounds;" and the words "authorize the construction," have obviously a more specific reference to the docks, wharves, bridges, and sewers mentioned, than to the public places and grounds, or to the ferries.

It is clear, therefore, that the various empowering words in the phrase must be construed distributively, *reddendo singula singulis;* and they must be distributed among the objects mentioned, in such a way as to give, with respect to each, only those powers which would naturally be conferred upon a municipal corporation, with reference to such objects.

To apply the word "make" to "ferries," and to construe it as conferring the absolute right of leasing indefinitely, or granting the franchise for all ferries from the town to any individual, would seem a forced interpretation, suggested rather by the desire to find in the act the authority sought for, than by the natural construction of the phrase itself. If "make" were the only word which could apply to ferries, or if "ferries" were the only word which would satisfy and give effect to the word "make," the construction contended for would be more plausible.

But the word "regulate" not only can be applied to ferries, but it is sufficient to confer all the authority with respect to them, which would naturally and appropriately be given to a municipal corporation, from whom a grant of the franchise in property is withheld; while the word "make" has a similar operation if applied to the bridges, wharves, piers, docks, sewers, wells, &c.

To make "ferries" is certainly an unusual and awkward expression. The more appropriate phrase would obviously be "to establish ferries;" and had the extensive powers with regard to them which are now claimed, been intended to be conferred, it is hardly possible that the legislature would have omitted in specific terms to grant and enumerate them. The construction contended for assumes that while the legislature withheld the grant of the franchise from the corporation as property, it nevertheless intended to give them full power to

grant the exclusive franchise as property to any individual; to be assigned or sold by him at pleasure, and capable of being owned by a foreigner or a citizen of another State; and all this by the force of the word "make," which is wrested from its natural application to other objects, and made to refer to ferries by an ingenious and forced construction.

The words "authorize the construction of" cannot be appealed to as conferring the powers attempted to be exercised in this case. Whatever propriety there might be in the phrase "construct a ferry," the power to do so can hardly be deemed a power to grant or lease an exclusive franchise and privilege of establishing it, especially when such franchise is not conferred upon the donee of the power to construct; and in this case the power is not given to "construct," but to "authorize the construction of ferries," if, indeed, it refers to ferries at all. It is, therefore, merely a power to permit, or to allow them to be constructed. It would surely be an unwarrantable latitude of construction, to hold that a power to permit the construction of a ferry, unaccompanied by a grant of the franchise, authorized the absolute grant of an exclusive franchise to any one the party empowered to permit might see fit to give it.

But, for the reasons before assigned, I think the words "authorize the construction of" apply to wharves, docks, piers, bridges, &c., and not to ferries; with reference to which they are obviously inappropriate.

But assuming that the words "make" and "authorize the construction of" apply to ferries, the question recurs, whether the trustees were authorized by the power thus given, to confer the right now claimed.

The ordinance under which the contract with Edward R. Carpentier was made, provides that "the trustees, &c., do

hereby make, open, widen, lay out, grant, create, ordain, establish, and regulate a public ferry between the said town of Oakland and the city of San Francisco, to be called the Oakland ferry; and they do hereby bargain and contract with Edward R. Carpentier, his heirs, agents, and assigns, to run said ferry for the period of twenty years, according to the terms of this ordinance, either as a separate ferry, or in connection with, or continuance of, the one already established and used between said town and said city, hereby granting, selling, and releasing and conveying to the said Carpentier, and to his successors in interest and assigns, exclusively, for the said period of twenty years, the right to keep and run a public ferry, or public ferries, so as to demand and receive compensation therefor, between the said town of Oakland and the city of San Francisco, or between the said town of Oakland and any other place; together with all and singular the ferry-rights, privileges, and franchises, which now are or may hereafter be owned by said town." The contract made in pursuance of this ordinance is in substantially the same language.

Admitting that so much of this ordinance as purports to establish, create, and make a public ferry between Oakland and San Francisco is a valid exercise of the power conferred on the trustees, we are next to inquire whether the grant and the subsequent contract was also within the power of the trustees.

It will be seen that the trustees in express terms convey and grant for twenty years, to Carpentier and his successors exclusively, the right of running and keeping a ferry or ferries between Oakland and San Francisco, and between Oakland and any other place, and they undertake to convey to him "all

the ferry-rights, privileges, and franchises which now are or may hereafter be owned by said town."

It is not contended that the town of Oakland was the owner of any exclusive ferry-franchise whatever. The grant, therefore, of the ferry-franchises owned by the town would, of course, pass for nothing. As to the grant of all ferry-franchises which might thereafter be owned by it, no observations are necessary; but it is said that the trustees, in the exercise of their power to establish ferries, had incidentally and as the appropriate means of establishing them, the right to lease them to individuals.

It is not necessary to inquire into the authority of the corporation to establish a particular ferry, and to lease it to an individual.

The right they have attempted to convey to Carpentier was not a lease of a particular ferry between a certain point in the town of Oakland and the city of San Francisco, but the exclusive right to keep and run a ferry or ferries between Oakland or any other place.

They thus abdicated and renounced the exercise of all the powers with respect to ferries with which they were entrusted, except that of "regulating." For the power to establish other ferries could be of no avail, so long as Carpentier retained the exclusive right to run and keep them.

It would perhaps be difficult to find, in the history of municipal corporations another instance of so extraordinary a grant.

It was not only not an exercise of any power they may have possessed to establish ferries, but it was, in effect, the surrender of the whole power to establish them, and it amounted to an agreement that no ferry should be established from Oakland to any place whatever, unless by the permission

of the person to whom they had given the exclusive right to run them. It seems to me that the legality of this grant cannot for a moment be supported.

The authority vested in the board was conferred upon them as trustees for the public, to be exercised for the public good. They had not only the right, but it was their duty, and that of their successors, to exercise the power of establishing ferries, as agents and trustees of the public, whenever the public good might require.

The power to establish ferries, if it existed at all, was a continuing power and duty, which existed in every board of trustees for the time being; and no covenant by one board not to exercise it, or for the exclusive enjoyment of the franchise by an individual, could prohibit or restrain their successors from exercising the powers vested in them by the statute to establish and license other ferries required by public convenience and necessity. (*Fay, petitioner, &c.*, 15 Pick. 243.)

But to ascertain more certainly the intention of the law, and the nature and extent of the powers conferred upon the trustees, the legislation of the State with regard to ferries must be considered.

By the act of March, 1850, all persons were forbidden to keep ferries without a license, except for their own use, or that of their families.

The Courts of Sessions were empowered to establish ferries across bays, creeks, or sloughs, bounding or within their respective counties, as they might deem necessary, and were authorized to issue a license to keep a public ferry to any suitable person applying therefor, for a term not to exceed one year, on the fulfillment by the applicant of certain pre-requisites. They could also license and establish additional ferries within less

than two miles from a regularly established ferry, when necessary for public convenience, and on notice to the proprietor of such previously established ferry. The act further provides for the establishment of ferries on private property, for the occupation of ground at either end of the ferry, and for the publication of a notice of the application for a ferry. It also prescribes the duties and privileges of ferrymen, and provides for the rates of ferriage, revoking licenses, and for the penalties to be imposed for a refusal to transport persons or property.

All these provisions were of a general character, and applied to all the counties of the State. They were evidently designed to provide by general law for the establishment of ferries, for conferring the franchise in suitable cases, with proper checks and securities, and with the express reservation of the right to confer a similar franchise upon persons other than the proprietor of the first-established ferry, whenever it might be deemed necessary or advantageous to the public.

The same provisions, in substance, remain as part of the general law of this State to the present day, except that it having been determined that under the constitution of this State the Courts of Sessions could not exercise the functions assigned to them by the act, the same powers, in substance, were, by the act of 1855, vested in the boards of supervisors.

On the 14th of April, 1853, an act was passed, declaring that the 2d section of the act creating and regulating public ferries, should not be construed to apply to the bays of San Pablo, Suisun, San Francisco, or Monterey; and the navigation of said bays, and the transportation of freight or passengers over, *across* or *through the same*, was declared to be *free*

and exempt from the restriction of any ferry-laws then in force in the State.

These provisions have been repeated, in substance, in all the succeeding ferry-laws passed on the subject.

It will not be disputed that these laws indicate and establish the settled policy of this State, with regard to public ferries: that it was intended to confer the franchise, for a limited time, on persons found to be suitable, and with certain privileges, checks, securities, and penalties, carefully provided by law; that such privileges were not to be exclusive, but other ferries could be established, contiguous to any established ferry, whenever deemed necessary; and that the State was to derive a revenue from the issuing of the licenses.

The law of 1853, and subsequent enactments to the same effect, show that the great arms of the sea therein mentioned, were not regarded as fit for the establishment of any ferries whatever, but that their navigation and the transportation of freight and passengers, *across, through, and over them*, were to be left free and exempt from the restriction of any ferry-laws in force in this State. Such being the settled policy and law of this State, with regard to public ferries, and with reference to the bays mentioned, it is not to be presumed, without the clearest evidence of a contrary intention, that the legislature intended to confer upon the trustees of a small town in the Bay of San Francisco, the power to grant an exclusive privilege to establish ferries across the most important of those bodies of water the navigation of which was, the next year, declared free and exempt from all ferry-laws.

If the general ferry-law, under which no exclusive rights could be acquired, nor licenses granted for more than a year, was deemed unfit to be applied to the Bay of San Francisco, the inference is irresistible, that it could not have been the

intention only one year previously, to confer upon the trustees of a town an unlimited power to grant exclusive privileges, for any period, with reference to the same waters, to any individual they might choose.

It is admitted that the law by which the power claimed was conferred, might at any time have been repealed. Had the legislature, when, in 1853, it declared the bays mentioned to be exempt from the operation of all ferry-laws, and the navigation over and across them to be free, supposed that the trustees of Oakland were empowered to grant an exclusive right to an individual to establish ferries to the most important city of the State, they would surely not have omitted to revoke the powers, and repeal the law by which they were conferred.

The question we have been considering, is purely one of construction; and even if the language of the act were more doubtful, yet when read by the light of the previous and immediately subsequent legislation of the State, its true interpretation would seem to be unmistakable.

But, it is said that the power to establish a ferry imports *ex vi termini*, a power to confer exclusive rights in the ferry so established; that without such rights it would not be a ferry in the legal sense of the term. But on this point, the case of *Fanning* v. *Gregoire* (16 Howard, 524) is decisive. In that case, Fanning claimed under a direct grant from the legislature, authorizing him to keep a ferry at the town of Dubuque, across the Mississippi river, for the term of twenty years. This he accordingly established. Subsequently, the State conferred upon the city-council of Dubuque, power to license and establish public ferries across the Mississippi; and under the power a license was granted. On a suit by Fanning against the license, it was held that his franchise was not exclusive, but that the legislature had a right to license other ferries.

It is clear that if a direct grant to an individual, of authority to establish and keep a ferry at a particular place does not vest in him an exclusive franchise, the grant to a municipal corporation power to establish ferries does not authorize them to bestow exclusive privileges. If the term "ferry" in the grant to Fanning did not impart any exclusive franchise, it cannot have that meaning in the act incorporating Oakland. It can surely make no difference whether the State is supposed to have duly surrendered to an individual its power of improvement and accommodation in a great and important line of public travel, or whether it is supposed to have authorized a municipal corporation to surrender it; in either case "its abandonment ought not to be presumed, where the deliberate purpose of the State to abandon it does not appear." (1 Peters, 514.)

It is urged that, even if the town of Oakland or the State had power to license other ferries, yet the right of complainant to the exclusive enjoyment of the ferry on the particular ferry-ways established by him ought to be protected. But in the case above referred to, no such distinction appears to have been taken. The right claimed was, like this,—an exclusive right to run a ferry from a certain town across the Mississippi for twenty years. The infringement complained of was the licensing and establishment of another from the same town across the same river. The court decided that the franchise claimed was not exclusive, and that the establishment of the second ferry was legal. It is nowhere suggested that the second licensee could not run his boat from any part of the town of Dubuque, and even from the same wharf as that used by the first licensee.

2dly. The privilege attempted to be granted in this case, was not the privilege of keeping and running a ferry from any specified dock or wharf in the town of Oakland to any other

point across the bay. It was the right to keep and run a ferry or ferries from the town of Oakland generally to any place whatever. Whether, if the trustees had established a ferry from a certain wharf, and leased the same to an individual, his rights in such ferry would have been exclusive, it is not necessary to inquire; for the right granted was the exclusive right to run "a ferry or ferries" from the town of Oakland to any place, with all the ferry-rights, privileges, and franchises then owned or thereafter to be owned by the town.

But admitting, for the sake of argument, not only that the trustees were empowered to establish ferries, but that the legislature intended to confer upon them powers to grant to an individual the exclusive franchise for any period, of running and keeping the ferries so established, such a construction affords an argument almost irresistible, that those powers could only have been conferred with regard to ferries wholly within the corporate limits.

Within those limits is the creek San Antonio, which can only be crossed by bridges or boats. If, then, the power to grant the franchise in property was intended to be conferred, it is surely more reasonable, and more in accordance with every rule relating to the construction of grants of this description, to construe it as referring to ferries across waters wholly within the corporate limits, than to suppose it to extend to ferries across a bay the navigation of which was, in less than a year afterwards, declared free and open to all.

With reference to the streets, docks, wharves, and sewers, this limitation is necessarily understood. Why not with regard to ferries, if the power to grant the franchise was intended to be given? The ferry from Oakland to this city affords the principal, if not the only means of convenient access to the commercial centre and chief seaport of the State,

not only to the citizens of Oakland, but to the inhabitants of a considerable district; and the possession of an exclusive franchise of running and keeping all ferries between Oakland and this city, gives to the possessor the practical control of the means of communication. Can it be supposed that the legislature intended to give the power to grant such a right to the corporate authorities of a town situated at one terminus of the ferry, and to take away or render nugatory the rights of the county at the other terminus to license ferries across the water forming their common boundary? That this right existed in both counties under the law of 1851, is clear. But the privileges conferred by the license under the ferry-laws, are limited, and not exclusive in the person obtaining the license. To suppose, then, that the power contended for was conferred upon the trustees of Oakland, we must suppose that the powers given to every county on the bay of San Francisco, between which and Oakland a ferry might be established, were revoked and the general ferry-laws on that subject repealed by implication. And this by force of the word "make," which we are asked first to apply to ferries, and then to construe as has been explained. It may be said that the question is not now as to the right of other counties to license ferries under the general ferry-laws. This is true. But the question is as to the exclusive right of the complainant to a ferry between Oakland and this city—as against the defendants; and in construing the law under which his alleged rights are claimed, it is of importance to show that the power to confer such rights was incompatible with the then existing laws conferring powers over ferries to other counties, and could only have been given by repealing *pro tanto* those laws; as also that it was incompatible with subsequent laws, by which all power to establish ferries over the waters in question was taken away.

It has not seemed to me necessary to refer on this point to the general rules relating to the construction of grants of this kind.

It is not denied that grants of privileges, franchises, etc., are to be strictly construed, and that nothing is to be taken by intendment.

It is claimed, however, that this is a delegation of legislative authority, and not a grant of a franchise, and that therefore a different rule must be applied. I confess myself unable to see the propriety of this distinction in the present case.

The State is the sovereign from whom the power is derived, whether it is supposed to have granted directly to a corporation the exclusive franchise as property, as was done in the case of the city of New York, or to have granted to the corporation power to make an exclusive grant of the franchise to an individual; in either case, the rules of construction must be the same. It can surely make no difference whether the corporation is the direct grantee of the franchise, or the donee of a power to make a grant of it and receive the consideration.

Many other questions were raised and argued at the hearing, which it is unnecessary to discuss.

On the whole, I think,

1st. That it is at least doubtful whether the act incorporating the town of Oakland, gave to the trustees any other power with regard to ferries than that of regulating them.

2d. That if the power to establish ferries was conferred, such power was held by them as a public trust, to be exercised by them and their successors when the public good might require. They had, therefore, no authority to confer upon any individual the exclusive right to keep and run a ferry or ferries, between Oakland and San Francisco, still less such a right

with regard to ferries "between Oakland and any other place."

3d. That if such powers were intended to be given the trustees, they could only have referred to ferries across waters wholly within the corporate limits of the town.

4th. That under any possible view of the case, the right of the complainant is doubtful; and that, therefore, the injunction ought not now to be granted.

Hoge & Wilson, and *E. W. F. Sloan*, for complainant.

Gregory Yale and *Crockett, Baldwin & Crittenden*, for defendants.

MEZES *v.* GREER *et al.*

Circuit Court, U. S., July Term, 1858.

WHERE parties set up conflicting claims to property, with which a special tribunal may deal, as between one of the parties and the government, regardless of the rights of third parties, the latter may come into the ordinary courts of justice and litigate their claims.

Such party can only litigate in the tribunal which can afford the relief asked. If his right be legal, he must seek it in a court of law; if an equity, in a court of chancery.

The *proviso* in the act of congress approved March 3, 1851 (9 Statutes at Large, 801), in relation to patents, does not destroy the distinction between equity and law which obtains in the federal courts.

The plaintiff holds a legal title. The title of defendants, in this case, is inchoate, and not such as can be used in bar of an ejectment, where a legal title is counted on.

The questions which arose in this case, and the facts out of which they grew, are set out in the opinion of the court.

MCALLISTER, J.—This is an action of ejectment, brought for the recovery of certain lands situated within this district. The plaintiff introduced and relied on a patent which had been issued to him from the government of the United States. The defendants then offered a Mexican grant, and a confirmation of the claim under it by the Board of Land Commissioners created by the act of congress of March 3, 1851 (9 Statutes at Large, 631), with an affirmance by the District Court of the

United States for the Northern District of California, on appeal from the said decision of the land commissioners. The plaintiff presents a perfect, legal title. To that of the defendants we shall hereafter allude. There is no doubt that where parties set up conflicting claims to property, with which a special tribunal may deal, as between one of the parties and the government, regardless of the rights of third parties, the latter may come into the ordinary courts of justice for relief, and litigate their claims. Thus, a party may go into a court of equity, to set aside the decision of the register and receiver, confirmed by the commissioner, and which was obtained by fraud. (*Garland* v. *Wynn*, 20 Howard, 6.) But the party seeking relief can only obtain it in the tribunal which has the power to afford it. If his right be a legal one, he may vindicate it in a court of law; if equitable, he must enforce that equity in another forum. "An equitable claim," says Mr. Justice McLean, "however strong it may be, cannot be set up at law to defeat the legal title." (*Lessee of Baird* v. *Wolfe*, 4 McLean, 552.)

The provision in the act of congress of March 3, 1851, which enacts that the patent to be issued under it "shall not affect the interests of third parties," does not alter or change the jurisdiction of the courts of the United States, nor destroy the distinction which by their law separates legal from equitable rights; prescribing, as they do, as rules of action in administering the former, the principles of the common law, and in the administration of the latter, the rules and proceedings of chancery. Now, as, prior to that enactment, the party to vindicate a legal right must be in a court of law,—to enforce an equity he must be in a court of equity. In *Willot et al.* v. *Sandford*, (19 Howard, 79, 82), it is said, "In the next place, the United States reserved the power to survey and grant claims to lands,

&c. . . . nor have the courts of justice any authority to disregard surveys and patents, when dealing with them in actions of ejectment." It does not seem to be denied, that the foregoing principles must control the action of the court; but it is contended, that defendants have a perfect, legal title. Being in a court of law, if both parties had legal titles, the question would arise how far this court would follow some of the State courts who, in a court of law, in a conflict between two legal titles, permit the parties to go behind them into the prior equities. It is admitted that the Mexican grant offered in evidence had never received the approval of the departmental assembly of California; that no judicial possession of the land was ever given, and that no survey of the land, or severance of it from the public domain, by a functionary of Mexico, was made before the cession of California to the United States. It is contended, however, that the approval by the departmental assembly was unnecessary to make it a legal title; and the fact that there was no judicial possession given does not affect the title, because the boundaries of the land are given so precisely in the grant, there was no necessity for a survey and delivery of judicial possession. If the court could dispense with the action of one of the political departments of Mexico, in the exercise of the granting power, and consider the title as legal and complete, it is still strange that—if the boundaries are so precisely described as to dispense with any necessity for a survey — the surveyor to whom the duty was confided of making a survey correctly, has not only failed in finding the boundaries, but erred so egregiously as to cause great alleged injustice to the defendants.

The grounds relied on to establish a perfect legal title in the defendants are, *first*, the Mexican laws; *second*, the confirmation of the claim under the title derived from those laws,

made by the District Court; and *third*, the clause in the act of March 3, 1851, which declares the patent when issued shall not affect the rights of third parties.

As to the first ground, a Mexican title, precisely similar to the one under consideration, save there had been no confirmation of it, was fully considered by this court in the case of *Tobin* v. *Walkinshaw*, at its September term, 1855; where it was decided that a Mexican grant which had not received the sanction of the departmental assembly, and where there had been no judicial possession given nor any severance of the land from the public domain prior to the cession of California to the United States, was not such legal title as would sustain an action of ejectment, and defeat a legal title. This court gave in that case the reasons, in detail, on which it rested its decision. Until the action of the appellate tribunal shall ascertain the error of this court in that case, the reasons which then governed must control in this. The court cannot, therefore, consider that defendants hold a perfect title under the Mexican laws.

The next enquiry is, if a legal title is not held under the Mexican laws, did the confirmation of the claim by the District Court, under that title, give defendants a legal title? The court knows of only three modes by which a legal title to real estate can pass from the United States,—to wit, by patent; by legislative confirmation, followed by a survey in the terms prescribed by it; or by a legislative confirmation describing the boundaries of the land with such precision as, in the absence of anything to the contrary, raises the fair inference that all the land within the prescribed limits was intended to be granted, thus dispensing with the necessity of a survey by an officer of the United States. In each of these modes, the granting or political power is exerted. The court is aware of no case in which the decree of a judicial tribunal has operated

per se as the conveyance of the legal title to real estate. In *Hickey's Lessee* v. *Stewart* (3 Howard, 750), it was held, that the decree of a court of equity, declaring the complainant the equitable owner of land, and directing the defendant to convey it,—though in part executed by a writ of *habere facias*, putting the party in possession of part of the premises,—does not confer a legal title, and is not a bar to an action of ejectment. In that case the court say, "The defendant in ejectment can never defend his possession against the plaintiff upon a title in himself by which he could not recover the possession if he were out, and the plaintiff in, possession. Reversing the position of the parties in this case, could the defendants, if plaintiffs recover the land in controversy upon this decree, and evidence of possession under it, prevail against the title of the plaintiff? We have no hesitation in saying they could not; and, therefore, the decree, if founded upon a valid, equitable title, would be no *legal* bar to the action of the plaintiffs."

In *Lessee of Baird* v. *Wolfe* (4 McLean, 549), the plaintiff gave in evidence a patent. The land had been located by survey by one Baird, and sold to one Dunbar. The claim had been reported on favorably by the land-officer, whose report was made to congress, and by them examined and confirmed; and a certificate was issued, which authorized the person to whom it issued to locate the land within the time and place limited. It was contended that the act of congress, confirming the right to the tract of land to the original claimant upon the report of the register and receiver, vested in the claimant the legal title. But [the court say], "this was not the effect of the confirmation. It was the right to the four hundred acres of land which was confirmed, and not to any particular tract of land. The certificate which the claimant received as evidence of his right, authorized his location of the four hundred acres.

A legislative act, confirming a title which was in its terms final, and required no further action of the government, would be considered a grant. But the right before us is not of this character." In that case congress itself had directly transferred the title to the right; but as something else was to be done for the segregation of the land, until that was accomplished the title was deemed inchoate.

In *West* v. *Cochran* (17 Howard, 415), the court say, "It was competent for congress to take up these titles or rights, and act on them, either by legislating directly that each claimant should be confirmed, and have a perfect title to his actual possession," &c., "without ascertaining, in the act of confirmation, or by any special means provided therein, the bounds of claims confirmed. But it was also competent for congress to provide that before a title should be given to any possessor, the exact limits of his possession and the title which the United States was to give should be defined, and that this should be done by such agencies and in such manner as might be fixed by congress. This is in entire accordance with the provisions of the treaty, which guarantees to the inhabitants the rights of property secured to them; but it was not intended to provide for the particular modes and instrumentalities by which such rights should be ascertained and enforced; these being left to the nation, to whose powers they were confided; so that the question is, What has congress deemed expedient? Now, the policy which is so obvious, and which has been acted on by the United States ever since they began to exercise power over the public lands, namely, to give defined limits to grants, may well be supposed to have actuated congress in 1807. The provisions of that act clearly show that although congress intended that the commissioners should adjudge the existence of good titles to lands held under French and Spanish possessors, yet they did not intend that a final

legal title, as against the United States, should be made to vague grants, until their bounds had been ascertained by the means there designated, and the particular tract defined by survey."

Now, congress have by the act of March 3, 1851, designated the means by which to ascertain the limits of lands the claims to which had been confirmed, namely, by a survey made by the appropriate officer of the government, the evidence of which survey and the alienation of the title was the patent to be issued. It is evident that congress did not intend any more in this than in the case just cited,—to part with the legal title until the exact limits of the land had been defined by previous survey. When such patent shall have issued, the presumption would arise that the patent was valid, and it would be *prima facie* evidence that all incipient steps had been regularly taken before the title was perfected by the patent. (*Minter* v. *Crommelin*, 18 Howard, 88.) In *Bagnell et al.* v. *Broderick* (13 Peters, 450), the court say, "Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the federal government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title; and until its issuance the fee is in the government, which by the patent passes to the grantee, and he is entitled to recover the possession in ejectment."

The conclusion to which the court has come is, that the title of the defendants in this case cannot be set up in this court against the legal title of the plaintiff. The same is therefore excluded as evidence in this cause.

Johnson & Rose, for plaintiff.

Jeremiah Clarke and *Crockett & Crittenden* for defendants.

BRAGG *et al. v.* MEYER.

Circuit Court, U. S., July Term, 1858.

If a party entrusts his property to a broker for sale, who pledged it to a third party to secure the payment of money borrowed for his own use, the owner can recover the property from the lender who has obtained possession of it.

The possession of the goods by the broker conferred no power on him to pledge the property to secure his own debt.

If he was acting notoriously as broker, his operating in two or three instances on his own account does not denude him of the character of broker.

The delivery by plaintiff of the possession of the goods to the broker for the purpose of sale, did not authorize him to pledge them; and nothing less than proof of a usage in San Francisco, that the general custom was under no circumstances to trust the goods to the broker, will authorize the inference of a power to pledge them.

The question involved in this case being a commercial one, must be adjusted by the application of the principles of the law merchant, and does not come within that class of cases where the decisions of the State Courts conclude the action of this court.

About the 31st day of May, 1858, the plaintiffs employed one Edward Heilbruth, a merchandise broker, to sell as a broker, 650 bags of Manilla coffee. A day or two subsequent to which employment, the broker reported to the plaintiffs that he had sold 200 bags of said coffee to one M. Dubroca, and the remaining 450 to one C. Vanard; that both of said sales had been made on a credit of thirty days; that the respective purchasers desired the delivery of the coffee; and, therefore, he wished orders for the delivery of the same from the ware-

house of D. Gibb & Co., where said coffee had been stored, for the purpose of delivering the same to the purchasers. Thereupon, the plaintiffs delivered to the said broker the orders for the purpose of having the coffee delivered to the reported purchasers. Two warehouse-orders were given; one for 200 bags of coffee to the said Heilbruth, the other, for 450 bags deliverable to the order of said Heilbruth. The reported sales to Dubroca and Vanard were regularly entered by the plaintiffs in their sales book; and they had no suspicion but that the same were veritable and *bona fide.*

On or about the 3d June, 1858, Heilbruth having possessed himself of the two warehouse-orders drawn by plaintiffs on D. Gibb & Co., called upon T. Lemmen Meyer, the defendant, to borrow money on the security of the coffee. Heilbruth told Meyer that the coffee was stored at D. Gibb & Co.'s warehouse, whereupon Meyer said he would advance the money requested on a pledge to him of the 650 bags of coffee; but, before he would advance a dollar, the coffee must be stored in the warehouse of one Strauch (a friend of Meyer); and that when Heilbruth produced Strauch's warehouse-receipt, showing that the said coffee was stored in his (Strauch's) warehouse in his (Meyer's) name, he would give the amount of loan desired, $3,700. No evidence was given to show that any papers were ever exhibited to defendant by Heilbruth, or that the former asked for any. On the 4th of June, 1858, the 650 bags of coffee were transferred from the warehouse of D. Gibb & Co., to that of Strauch, and stored in the store of the latter, in the name of Meyer. On the presentation to latter by Heilbruth of the receipt of Strauch, the loan was completed; Meyer taking the individual note of Heilbruth, with a written pledge of the coffee as security.

On the following day, Heilbruth absconded from San

San Francisco, in the steamer which left for Panama on that date. A few days subsequent to the departure of that steamer, the plaintiffs discovered the falsity of the reported sales made by Heilbruth, and learned that the coffee was in the possession of the defendant.

A demand having been made for the coffee and refused, the present action is brought for its recovery.

The following charge to the jury, with instructions, were given by—

McAllister, J. This is a controversy between two honest parties, as to which of them shall bear the loss consequent upon the fraudulent conduct of a third. The plaintiffs placed their merchandise in good faith in the hands of a third party, to sell. The defendant, with equal good faith, loaned money to that third party, taking as security, the goods of the plaintiffs, in ignorance of the fact.

The case of the plaintiffs rests upon the application of the rule "*caveat emptor*;" that of the defendant upon the proposition, that when one of two innocent parties must suffer by the fraud of a third, the one who enabled such third party to commit the fraud by placing him in possession of the goods by whose instrumentality the fraud was committed, should be the sufferer.

The transaction out of which this controversy arises, is a commercial one, and must be determined by the general principles of commercial law, which constitute a part of the common law, adopted by this State. It would be passing strange, if amid the varied transactions, so ordinary an occurrence as the circumvention of two merchants by one dishonest person, has not, unfortunately, too frequently been encountered by the investigation of courts and juries. The principle involved in

this case, is by no means novel; but its great practical importance in a mercantile community, and the supposition that it has been permanently settled by the adjudications of the Supreme Court of this State, induce this court to give it a more extended inquiry, than under ordinary circumstances would have been demanded by any intrinsic novelty or difficulty in the question.

Reliance has been placed by counsel for defendant on the case of *Leet* v. *Wadsworth & Meisegaes* (5 Cal. 404), and on that of *Hutchinson* v. *Bours* (6 Cal. 383). Before examining these cases, it will be proper to ascertain, assuming that they go to the extent contended for, how far they are to control the action of this court. The Supreme Court of the United States have on more than one occasion given their views upon this point. They have decided that the 34th section of the judiciary act of 24th September, 1789, which makes the laws of the several States rules of decision for the federal courts, is confined to local statutes of a State, and the construction thereof, by her courts, and with matters connected with titles to real estate, and matters strictly intra-territorial; and they say, We have not the slightest difficulty in holding that said section does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are sought, not in the decisions of the local tribunals, but in the general principles of commercial jurisprudence. Undoubtedly, the decisions of local tribunals upon such subjects are entitled to, and will receive the most deliberate attention and respect of the court; but they cannot furnish rules or conclusive authority by which our own judgments are to be bound and controlled. (*Swift* v. *Tyson* 16 Peters, 1.)

No legislation of this State has regulated the point under

consideration. It must therefore be decided by a resort to the principles of the law merchant.

I have made the foregoing observations, in the event if the two authorities cited from the Supreme Court of this State shall be deemed to cover this case, they may not be supposed to control conclusively the action of this tribunal. My examination of those cases, however, has brought me to the conclusion, whatever may be the strength of the language in the opinions of the court, no decision was made in either case upon the exact point under consideration. In the first case, *Leet* v. *Wadsworth & Meisegaes*, the factor had purchased goods in *his own name*, had stored them in his own name, and paid the storage upon them for eighteen months, the principal being in the mean time frequently in San Francisco, in intimacy with the agent. The factor pledged the goods to a third party. Now, the court may have well decided that case on the ground that it belonged to that special class in which the owner had been guilty of gross negligence, amounting to fraud upon a third party, and was therefore estopped from setting up his title. That the court did not intend to impigne on the general rule, is evident from their stating "at common law, the business of a factor was merely to sell the goods of his customers; so it followed, that his possession was no evidence of his ownership, and as he was not allowed to pledge the goods of his principal; in case he did so, the pledgee was chargeable with notice of the true owner's right." And they placed this decision on the ground that the party who pledged, had purchased the goods in his own name, which afforded proof of apparent ownership, and he was therefore entitled to sell *or* pledge.

In the second case (*Hutchinson* v. *Bours*) the decision recognizes the general rule; for the court say, "Where the party

pledging is technically a broker, where his only business is to sell goods consigned to him for that purpose," he has power to sell them only, and no power to pledge them. While thus affirming the general rule, the court in that case deny its applicability, inasmuch as the party who pledged was not a *technical* factor; whom they decide to be one whose *only* business is to sell goods consigned to him. Out of the city of London where there are special legislative organizations of brokers, I can find no distinction drawn by any text-writer, or any illustration by decided cases, between a technical or any other kind of broker. I take one who notoriously acts as a broker, and sells the property of others so publicly as to be known as acting as such, to be a broker; if not so notoriously known, he is neither a technical nor any other kind of broker. The fact that one occasionally operates on his own account will not denude him of the character of a broker, if he really acts notoriously as such. There are numerous cases in which one has been recognized to be a factor or broker, who in addition to his business as such occasionally dealt on his own account.

In *Martini* v. *Coles* (1 Maule & Selwyn, 140), *Vos* was decided to be a factor, although simultaneously he acted as a *general merchant.* In *Phillips* v. *Huth* (6 Mees. & Welsby, 573), *Warwick*, the factor, was also "*an extensive dealer in tobacco*," and pledged the plaintiff's "dock-warrants" at the same time with some of his own.

In *Baring* v. *Conic* (2 Barn. & Ald. 137), "*Coles & Co.* were merchants as well as brokers, and bought and sold largely on their own account, and had before the time of the sale of the sugars in question, dealt with defendants both in buying and selling on their own account. Yet (say the court) these facts did not exempt them from the operation of the general

rule applicable to brokers. In *McCombie* v. *Davies* (6 East, 538), *Coddan*," the broker, was "also a dealer in tobacco on his own account." Other cases to the same point might be cited. I can see no such incompatibility in a man notoriously following the occupation of a broker or factor and his occasionally operating on his own account, as should disqualify him from being considered as a factor or broker.

In *Hutchinson* v. *Bours*, the Supreme Court of this State may have gone upon the ground, that the character of factor in that case had become merged in the great mass of business transacted by him on his individual account. After a careful review of the cases cited from the Supreme Court, I have not satisfied myself that the exact point in this case was decided in either of those cases. If they do cover this case as contended by defendant's counsel they cannot conclude this court.

The question must be decided by a resort to the general principles of commercial law. Although the possession of personal chattels is said to be *prima facie* evidence of property, and consequently of an apparent power of disposition, yet it is no less true, that when property does not in fact exist, possession confers no right either on the holder himself or a vendee under him who pays a valuable consideration on the faith of such possession. The only exception to this rule at common law is, that of a sale in *market overt;* which is inapplicable to this country. The views expressed by a recent writer on the sale or pledge of chattels personal are so sound, that it is proper to bring them to your notice. He says, "There are, indeed, only two grounds on which property can be supposed to arise in a vendee in consequence of a sale made by a vendor who has no property in himself. The first of these supposes a transfer of the title of the true owner by virtue of some express or implied authority from him; the

second, the creation of a new and independent title growing out of the circumstances attendant upon the sale; such as the possession of the property by the vendor, the valuable consideration paid by the purchaser, and the *bona fides* of the transaction so far as he is concerned." (1 Smith's L. C. 894). It is not contended in this case, that an express authority was given to pledgee; and so far from there having been an implied one, the relation which existed between Heilbruth and the plaintiffs (provided you shall believe that the former was a broker and was employed as such by plaintiffs) directly disaffirms any implied authority to Heilbruth to pledge. It is within the second class of cases referred to, defendant seeks to bring himself. He contends that where one of two innocent persons must suffer by the fraud of a third person, he who placed that third party in possession, and thus enabled him to perpetrate the fraud, must bear the loss.

Now, if this be a sound proposition, it would follow that the well-settled rule of "*caveat emptor*" must be dispensed with, and that the possession of goods by a *quasi* public officer (a broker) to sell, constitutes a title which authorizes him to pledge them for his own debt. The writer last cited alludes to this proposition in these words: "It has been sometimes argued, that where one of two innocent parties must suffer from a sale under these circumstances, the loss should fall upon the owner, who has entrusted the vendor with the possession of the goods and enabled him to commit a fraud, rather than the vendee who acts in good faith and with proper caution. But if this conclusion could follow in *any* case, it would do so in those where a factor has been entrusted with the *indicia* of title in chattels, in addition to the possession of the chattels themselves, and with the authority not only to sell

them, but to sell them as his own, and has thus been enabled to hold himself out to the world as the owner, in contracts with third parties, who advance money on the faith of his apparent ownership, and a deposit of the goods in pawn. Yet it is well settled, that such a pledge gives no right whatever to the goods as against the real owner, not even that of the factor." (*Ibid.* 896.)

To sustain this well-settled doctrine, the author refers to numerous authorities from England and this country.

Chancellor Kent, in his Commentaries, says, "Though a factor may sell, and bind his principal, he cannot pledge the goods as security for his own debt, not even though there be the formality of a bill of parcels and a receipt. The principal may recover the goods of the pawnee; and his ignorance that the factor held the goods in the character of factor is no excuse. The principal is not even obliged to tender to the pawnee the balance due from the principal to the factor; for the lien which the factor might have had for such balance is personal, and cannot be pledged by his *tortious* act in pledging the goods for his own debt. If the pawnee will call for the letter of advice, or make due inquiry as to the source from whence the goods came, he can discover (say the cases) that the possessor held the goods as factor, and not as vendee, and he is bound to know at his peril the extent of the factor's power. (2 Kent, 625.)

I have given you the law on this subject; but it is necessary to say, in order that you may be prepared to meet any state of facts which may present themselves to you, that if the conduct of plaintiff has been unusual and contrary to the course of business to such extent as to mislead third parties who act with reasonable care, such a case would constitute an

exception to the rule. The only ground taken in this case as to the conduct of the plaintiff is, that he parted with the possession of the goods at the time he authorized the broker to sell.

Upon this and the other points in the case, I give you, Gentlemen, the following instructions:—

1. If you shall find from the evidence, that Edward Heilbruth was a merchandise broker; that he acted as such in this city; that the plaintiffs entrusted to him their property, as such broker, to sell; and that he pledged those goods to the defendant, to secure his individual indebtedness to him,—in such case, you will find a verdict for the plaintiffs, unless you find the case to be within the exception stated in the instruction No. 4, hereafter to be given.

2d. The possession of the goods by Heilbruth, as broker, conferred no authority on him to pledge them; the relation he bore to the plaintiffs disaffirmed all such authority; and the ignorance of pawnee as to the character in which Heilbruth acted, cannot defeat this action. It is a case in which the rule of "*caveat emptor*" must apply.

3d. If you find that the character of Heilbruth was that of a merchandise broker, and plaintiffs entrusted their property to him as such, the fact, if you should so find, that he occasionally on one, two, three occasions or more, during the time he acted as broker, had some transactions on his own account, such fact will not annul his character as broker, or deprive the plaintiffs of the protection which the law extends to them by reason of the relation which existed between them as principals and Heilbruth as their broker.

4th. If you should be of opinion that, according to the usual course of business, and in the exercise of due care and prudence, the plaintiffs should not have delivered possession of the coffee to Heilbruth; that their so delivering it to him

enabled him to practice a fraud upon the defendant, and that defendant exercised reasonable care and diligence to avoid that fraud, according to the usual course of business in San Francisco, you must find for defendant.

This last instruction is asked for by defendant, and is acquiesced in by the counsel for the plaintiffs. I therefore give it to you, with the caution that you are to take it together with the preceding instructions, when you are deciding upon the conduct of plaintiffs in delivering possession of the goods to the broker. That fact alone, unless proved to be opposed to a well-established usage in San Francisco, cannot defeat the present action.

Verdict for plaintiffs, $1,875.

Hall McAllister, for plaintiffs.
S. L. Johnson, for defendant.

LAWRENCE *et al. v.* BOWMAN *et al.*

Circuit Court, U. S., July Term, 1858.

INJUNCTIONS granted in this court are all special, and grantable only on notice.

Due notice is not susceptible of a fixed definition, and must be construed in each case by its circumstances.

Under ordinary circumstances, one day's notice is too brief; but there is no fixed limit as to time.

Every court of equity has power to mould its rules to meet the purposes of justice.

It is not indispensable that a bill for an injunction should contain a prayer for discovery.

In the English chancery, where common injunctions are issued, unless special application be made, only proceedings at law subsequent to the judgment are enjoined. *Aliter* in this country.

The form of an injunction in England included a provision that the party at law might proceed to judgment and execution. *Aliter* in this country.

A party who applies for an injunction to enjoin proceedings at law, is not bound to confess judgment at law, as pre-requisite to his obtaining relief in equity.

The bill in this case was exhibited to obtain an injunction to enjoin the trial of a case on the common-law side of this court. A motion is now made on the bill, exhibits, and affidavits, for the issue of an injunction. The facts as set forth in the bill, and the objections urged against the granting of the injunction, are stated in the opinion of the court.

McAllister, J.—The bill in this case is exhibited for the purpose of obtaining an injunction to stay the trial of an action of ejectment pending on the common-law side of this court. The trial of the action at law was fixed, by consent of parties, for the 24th day of the current month. On the day previous, an order was obtained from the judge to be served on the plaintiffs, to show cause why an injunction should not issue to stay the proceeding at law until complainant could obtain a hearing on the merits of his bill. As the trial at law was fixed for the succeeding day, and as the judge could grant no injunction without previous notice to the adverse party, he was obliged to act upon the idea that under no circumstances could an injunction issue in any case when applied for on the day preceding the trial of the cause sought to be restrained, and thus leave the complainant without remedy by injunction. The facts stated in the bill on a motion for an injunction, are to be taken as true; and the bill charged gross fraud of a character which it was alleged could not be availed of by the complainant in a court of law. On the following day the parties appeared, and among other grounds taken against the motion by defendants' solicitor, was the briefness of the notice and the *laches* of complainants in not moving at an earlier moment. The court acquiescing in the propriety of the suggestion as to the briefness of the notice, proffered an extension of time, which was declined by defendants' solicitor, who proceeded to the argument; and the first ground taken against the motion was the *laches* of the complainant; and the 55th rule of this court was cited as a reason for the denial of this motion. That rule prescribes that special injunctions shall be granted only on due notice to the opposite party. No fixed rule can be recognized as to what shall constitute "due

notice." "Due" is a relative term, and must be applied to each case in the exercise of the discretion of the court in view of the particular circumstances. Referring to rules generally, in *Ex-parte Poultney v. City of Lafayette* (12 Peters, 472), the court say, "Every court of equity possesses the power to mould its rules, in relation to the time and manner of appearing and answering, so as to prevent the rule from working injustice; and it is not only in the power of the court, but it is its duty, to exercise a sound discretion upon this subject." These views apply to all the rules of a court, and if the power to mould them is given, it certainly possesses that of construing them for similar purposes. In ordinary circumstances, the application for an injunction to stay a proceeding at law fixed, as this was, by consent of parties for trial on the following day, will be viewed with suspicion. But in this case there are circumstances which arrest the attention of the court. The parties are differently represented in this case than in the action of law. The solicitors for the respective parties before this court, are not those who are the attorneys of the parties in the action of ejectment. The latter evidently intended to place their defense in a court of law on equitable grounds. Those recently engaged for complainants fear to risk that movement, and now seek the interposition of a court of equity. The question to be decided has never been before this tribunal, and it has been understood that there have been conflicting decisions upon it in the courts of this State. The wavering policy indicated by a change of counsel, produced by such a condition of things disaffirms willful *laches* by the party, and is a circumstance which the court, in exercising its discretion, should take into consideration, particularly where its action is to affect seriously the rights of the party. If the motion be granted, the injury to defendants would be slight; as the court will give a hearing

on the merits at once; if desired by them. I cannot think then, that the delay in filing this bill in view of the circumstances should, *per se*, prevent all inquiry into the alleged fraud.

I shall proceed to investigate the other objections made to the motion. It is urged, that the bill sets forth no equity; that it prays no discovery; that it admits the legal title of plaintiff, and that defendant only avers an equitable right. It is also urged that by the bill and exhibits, and showing of complainants, the defendant is entitled to judgment and costs, and such damages on an issue to be had which he may recover at law; and that in the ordinary course of chancery proceedings, no injunction can issue save upon the terms that the complainant (defendant in the ejectment suit) suffer a judgment to go against him for the land, and upon the further condition of furnishing bond with sufficient security for the costs and such damages as may be recovered on the issue. These objections involve following propositions, and may be considered together. 1. There is no equity in the bill to restrain the prosecution of the suit at law, because no discovery in, and of it is asked, and the legal title in defendant is admitted. 2. That if an injunction is granted it must be upon terms that the defendants at law submit to a judgment for the land with costs.

By section 254 of the practice act of this State it is enacted, "that an action may be brought by any person in possession by himself or his tenant of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate, or interest." The complainants have filed a bill to determine the adverse claim of defendants, who have asserted one in the most emphatic manner, by bringing an action at law for the

recovery of the land. The fact that the assertion is made in the form of an action at law, does not deprive complainant at any time after the claim is asserted, of the right of vindicating his claim in opposition to the adverse one, if the circumstances are such as to authorize this court acting as a court of equity to take cognizance of the case. This section of the practice act is but a reiteration of general principles of equity, and is not without influence on the action of this court in the present case.

The language of the statute is unrestricted. The right of a party in possession is not defeated by the fact that the adverse claim is being asserted by an action. The complainant comes within the very letter of the law; and it is doubtful whether any course of chancery practice would authorize this court to consider the fact that the adverse claim was pending in the form of an ejectment suit, a reason to compel complainant to submit to a judgment at law, before he could have extended to him any equitable relief. It may be urged, that the statute of a State cannot affect the jurisdiction of this court, in the exercise of its equity jurisdiction. But this question has been before the Supreme court of the United States. In the case of *Clark* v. *Smith* (13 Peters, 195), the legislature of Kentucky, had passed a law, the only difference between which and the statute of this State is, that the former authorized one who had both the legal title and possession of real estate, to institute a suit, and described the decree to be made in case of a determination against the adverse claim; whereas the latter gives the right to any one who is in possession, and prescribes no form of decree. The reasoning of the court in that case relative to the statute of Kentucky, is applicable to that of this State. "Kentucky" [say they] "has the undoubted power to regulate and protect individual rights to her soil, and to declare what shall

form a cloud on titles; and having so declared, the courts of the United States, by removing such clouds, *are only applying* an old practice to a new equity created by the legislature, having its origin in the peculiar condition of the country." "The State legislatures certainly have no authority to prescribe the modes and forms of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued as it is in the State courts." (13 Peters, 203.) Now, if this suit had been instituted in a State court, not controlled by chancery proceedings, is it probable such tribunal, had it deemed the complainant entitled to the relief asked for, would withhold it until the party would submit to a judgment in the other suit? Apart from all foregoing considerations, arising out of the statute, we will inquire whether the proposition urged by counsel, that, according to the course of chancery proceedings, before an injunction can issue the complainant must submit to judgment for the land and costs, be correct. The authorities cited by defendant's solicitor, are two cases from the Irish chancery and exchequer courts, one from the English chancery, and two decisions from the State of New York. The two cases from Ireland are cited from Chitty's Equity Digest, sections 7 and 11, page 2265. The reports from which the notices are taken, are not accessible. These authorities, similar to most insertions in digests, are without a statement of the case, or of the reasons of the court, no authorities cited, and depend for correctness on the conclusions of the digester. Lord Mansfield has said, "There is no cause of greater ambiguity than arguing from cases without distinguishing *accurately* the grounds upon which they are decided."

In every case of a digest cited, the *accuracy* of the digester has to be relied on. The unreliable character of such authority, if such it can be called, forbids confidence. From what can be gathered from the digest in the first case, that of *Horn* v. *Thompson*, some fact not mentioned in the case must necessarily differ it from this; for instance, it appears in that case, that if the injunction had been granted the defendant would still have had a trial at law. In the second case, (*Redmond* v. *Goodoll*), the digester states, generally, that an injunction to restrain proceedings in ejectment, until the hearing will not be granted except the defendant give a complete judgment at law; and when defendant refused to do so, the injunction was refused. What were the facts, or grounds of decision, are not stated. Was the decision founded upon a rule of court similar to one existing in New York, or based upon the general course of chancery proceedings? Nothing is said upon the point. In the English case, *Barnard* v. *Wallis*, cited, 1 Craig & Phillips, 85, three questions were involved in the defense,—two purely equitable and one legal; a common injunction having issued, motion was made to dissolve it, which was granted. This case belongs to a peculiar class, where the defense is composed of both legal and equitable questions, referred to by Daniel, in his treatise on Equity Practice (p. 1844). "Sometimes [he says] the question between the parties depends partly upon a legal title, and partly upon an equity which will arise only in the event of that title being decided in one way. In this case, the practice of the court is, to require that the party applying to the court for its interposition, should admit the legal title of the other party, as in the case of giving judgment in ejectment." The case of *Barnard* v. *Wallis* belongs to such class of cases, and is totally dissimilar from this. It is true, that the judge, in his opinion, by way of recital alludes to the giving judgment in ejectment

suits, as a common case. It was for this reason, perhaps, that the case was cited by counsel as authority. The next case relied on, is that of *Carroll* v. *Sand* (10 Paige, 298); but this was decided with express reference to the 33d rule of chancery in New York. Even that rule contains a *proviso*, that a party may make special application to the court to restrain all proceedings at law after issue joined. The last case cited, is *Ham* v. *Schuyler* (2 Johns. Ch. 141). This is the only authority which sustains the proposition. The whole is comprehended in eight lines, and a single authority cited, that of Hinde's Chancery. Still, it is the opinion of an eminent chancellor, entitled to profound respect; and if the doctrine enunciated had not been repeatedly repudiated, would control the action of this court. This decision was made more than forty years ago, and rests upon an ancient text-writer, who wrote prior to the time of Lord Eldon, who was the founder of the modern practice of injunction. Lord Campbell has said, "Almost all the principles upon which this relief is granted or refused, the terms and conditions upon which it is dissolved, continued, extended, or made perpetual, are to be found in Lord Eldon's judgments *alone*." (Lives of Chan. vol. vii. p. 496.) A case was decided in Virginia which enunciates doctrines similar to that announced by Chancellor Kent in above case, which has not been brought to the notice of this court. (*Warrick* v. *Nowell*, 1 Leigh Rep. 96.) The only authority cited is 1 Vernon, 120; an ancient authority, obnoxious to the objections heretofore stated as to *Hinde's Chancery*.

Having commented on each of the authorities cited for this motion, a reference will be made to some which announce a different doctrine. Eden, in his treatise on Injunctions, states the general rule "that injunctions to stay proceedings at law, are granted either before or after the commencement of the action, or to stay proceedings, or after verdict to stay judg-

ment, or after judgment to stay execution, &c." The court, he says, are unwilling to interfere where it "appears, the plaintiff has lain by till after a verdict has taken place, if it is necessary for the obtaining a fair decision. (Eden on Inj., by Waterman, 68, 69.) In *Hoffman* v. *Livingston* (1 Johns. Ch. 211), an injunction had been issued to stay proceedings at law, for in that case, the defendant moved to be permitted to go to trial for a portion of the lands not claimed; and the motion for a dissolution of the injunction *quoad hoc* was refused. In *Pike* v. *Northwood* (1 Beavan, 152), the same doctrine is enunciated. In *Apthorp* v. *Comstock* (Hopkins, 143), the bill was filed for relief against a deed of conveyance of lands alleged to be fraudulent, and for an injunction to restrain the prosecution of certain actions of ejectment brought for the recovery of the lands. No discovery was prayed. Neither plaintiff nor defendant had any knowledge regarding the early transactions out of which the alleged fraudulent deed arose. This case was decided in 1824; and it enunciates the principle that it is a proper head of equity jurisdiction to relieve against fraudulent deeds, and that an injunction, in such a case, is properly auxiliary to the relief sought, as this court takes the whole controversy into its own hands, to prevent double litigation, and give more effectual relief than can be given at common law. In the case of the *State* v. *Reed* (4 Harris & McHenry, 6, 8, 10, 11), ejectment was enjoined before trial, and made perpetual on the hearing. No discovery was prayed in the bill. The next case is that of the *Duke of Beaufort* v. *Neeld*, decided in the House of Lords, on appeal from the chancellor, in the year 1845. Separate opinions were delivered by Cottingham, Brougham, and Campbell. The case is reported in 12 Clark & Finelly, 249. In that case, the Duke of Beaufort was legal owner of the premises; but Mr. Neeld was in

possession, obtained under circumstances which gave him a *mere* equity against the duke; who brought ejectment to recover possession. Mr. Neeld filed his bill to enjoin the further prosecution of the suit. Injunction was granted; but after answer filed, which denied the equity of the bill, the injunction was dissolved by the vice-chancellor, and the ejectment was proceeded in by the plaintiff at law. An appeal was taken from the vice-chancellor to the chancellor, who reversed the decision. An appeal was taken to the House of Lords, who decided the vice-chancellor was wrong. Lord Campbell, in delivering the opinion, uses the following language: "With regard to the first injunction (the one issued to restrain the ejectment-suit before trial), I must own that I never entertained a doubt, and down to this moment I have not been able to learn on what ground the vice-chancellor of England dissolved that injunction." (*Ibid.* 284.) In that case, the bill prayed for no discovery in aid of the suit at law. The last authority to which the court will refer, is the case of *Gaines* v. *Nicholson and others* (9 Howard, 356). The bill in that case, is set out in *totidem verbis*. No discovery was prayed. The case was an appeal from the decree of the Circuit Court, U. S., in Mississippi, granting a perpetual injunction to enjoin a pending ejectment-suit on the common-law side of the court. The Supreme Court admit the regularity of the proceeding. They say, "And, undoubtedly, if the facts thus charged have been established by the pleadings and proofs, a right to such equitable interposition for the relief sought has been made out, and the decree of the court should be upheld." After looking into the pleadings and proofs, they concluded that the charge of fraud had not been made out; and on that ground alone, reversed the decision of the court below. This court has entered more minutely into the authorities in this case by reason of the

large interests at stake, and because there has been some conflict in the authorities.

Against the decisions invoked in favor of this motion, from the Irish chancery and exchequer, from New York, and a case from the English chancery, we find two decisions from New York, one from Kentucky, two from England,—one of them in 1845, by Cottingham, Brougham, and Campbell,—and one by the Supreme Court of the United States. The weight of authority is decidedly against the principle embodied in the present motion. The court can, therefore, consult the spirit and policy of the statute of this State, without violating any of the rules of chancery proceedings.

The remaining question is, Does this case present such equitable claim as to call for the interposition of this court?

In England, common injunctions are those which issue of course. The special, are issued only on due notice, and founded on the circumstances of each case as they arise. (3 Daniel's Ch. Pr. 1810.) The distinction between them does not exist in the federal courts. In England, the injunction only operates upon the judgment and execution, consequently if a party seeks to stay proceedings at common law before trial, he must make special application on previous notice. The form of a writ of injunction in England always included a provision that the party at law might proceed to judgment and execution. In this country, on every application for an injunction the court has to decide whether the injunction shall issue, and to what extent. In the case at bar, complainants allege they are tenants in fee as tenants in common with the heirs of Stephen Smith, and are in possession of the land; that the defendants have instituted an action at law to eject them from the possession, upon a documentary title they allege to be fraudulent for causes of which they can only avail themselves in a

court of equity. Now, all these allegations, until denied, must on this motion be considered as true. They certainly constitute a case which entitles the complainants to the equitable interposition of the court.

An injunction must therefore be issued in accordance with the prayer of the bill.

Hall McAllister and *E. L. Gould*, for complainants.
Johnson & Rose, for defendants.

GIBB *v.* WASHINGTON.

Circuit Court, U. S., July Term, 1858.

An examination of goods by the appraisers is indispensable.

Personal examination of each article not necessary.

A fair selection of samples sufficient.

The official report of the appraisers, is *prima facie* evidence as to examination.

Appraiser under the acts of congress is a *quasi* judge. His acts, as such, are not purely ministerial. If such an office has been colorably created, and one commissioned under it who has discharged *de facto* its duties, his acts so far as the public or third parties are concerned, are as valid as those of one acting *de jure* would be.

The additional charges authorized by law, to be added to the appraised value of dutiable merchandise, may be added by the appraisers, with the sanction of the collector.

Costs of transportation of goods from the interior to the place of exportation, are not included in those charges under the act of 3d March, 1851.

The present action is brought for the recovery of moneys alleged to have been illegally received by the defendant as collector of the port of San Francisco, and paid by the plaintiff, under protest.

A jury was waived by the parties, and the case submitted to the court on the law and facts for its judgment. The latter are sufficiently set forth in the judgment of the court, delivered by—

McAllister, J. To sanction the defense, establish the illegality of the proceedings, and that the appraisement of the goods, on which the duties were levied, is void, plaintiff's counsel have presented the following grounds.

1st. That there should have been a personal examination of the goods by the appraisers.

2d. That the board of appeals who appraised the goods was not legally constituted.

3d. That additional charges unauthorized by law, have been made by the appraisers.

To sustain the first ground, reference has been made to the case of *Greely* v. *Thompson* (10 Howard, 225). There is no doubt the goods should have been examined. The oath of the appraisers imposes on them the duty of examination. But no form is prescribed, nor is it requisite that every article should be examined; a fair selection of samples or specimens is sufficient (3 Statutes, 735). In the case cited by counsel for the defendant (10 Howard, 225), the record shows that one of the appraisers never examined nor inspected the merchandise appraised, and the other never saw any portion of it. In the case at bar, in their report the appraisers state expressly, that they had examined the goods. In the absence of any counter-testimony, the official action of the appraisers must be taken as evidence of the fact of examination.

The second ground is, that the appraisement of the board of appeals was void, because one of their number was not authorized to act. The objection is in these words: "The appraiser

general, who sat as one of the appraisers at large, under the act of 1851, is appointed under a clause in the general appropriation bill of March, 1853. His name, and style, and compensation are different. The appropriation of $6,000 made, if it could be considered as creating by implication the office, is only for a year, and has never been renewed."

The facts as developed by the evidence are, that by an act of congress of 3d March, 1853, it was enacted that four appraisers should be appointed, who should be employed in visiting such ports under the direction of the Secretary of the Treasury as may be deemed useful by him, for the security of the revenue, and at such ports to afford aid and assistance in the appraisement of merchandise; and wherever practicable, in cases of an appeal from the decisions of the United States appraisers, under the provisions of the seventeenth section of the tariff act of 30th August, 1842, the collector shall select one discreet merchant, who shall be appointed with one of the appraisers appointed by this act, and their decision shall be final as to the value of the goods appraised. The appraisers (four in number) were appointed under this act, and were generally known and designated "general appraisers," or "appraisers at large."

On the 3d March, 1853, congress passed the following enactment, in the appropriation act of that year: "For the compensation of an *additional* appraiser-general, to be appointed by the president, with the advice and consent of the Senate, and to be employed on the Pacific coast, six thousand dollars." Subsequently, a commission was issued to Richard Roman, appointing him appraiser-general during the pleasure of the president for the time being, under the act of 3d March, 1853, to be employed on the Pacific coast. By virtue of this commission, Major Roman entered upon the duties prescribed by

the act of 3d March, 1851, and has continued those duties down to the present time.

An appraiser is said to be "a *quasi* judge or legislative referee." (*Hoyt* v. *United States*, 10 Howard, 109.) If such an office has been even colorably created, and the Present incumbent has discharged *de facto* its duties, then any irregularity which does not render the creation of the office void, cannot be availed of in this collateral proceeding. His acts as appraiser *de facto*, so far as the public or third parties are concerned in interest, are as valid as if they were the acts of an appraiser *de jure*. (*The People* v. *Stevens*, 5 Hill, 617; *The People* v. *Covert*, 1 Hill, 674; *McInstry* v. *Tanner*, 9 Johns. 135.)

One of the judges of this court, in view of the acts of congress, the commission issued to Major Roman under them, and his acting as appraiser *de facto*, came to the conclusion that it was unnecessary to go into a minute examination of the creation of the office, and the party having acted as appraiser *de facto;* the validity of his acts could not be assailed in this collateral proceeding. But as his associate deemed it proper that the creation or not of the office should be discussed and decided, and as both judges concur in the same conclusion, after such examination, it is unnecessary to place the decision of the case on the ground above stated. I proceed, then, to that examination.

It is contended, that no such office as the one claimed by defendant to exist, has been created in fact; that the incumbent is not authorized to act under the act of 3d March, 1851, under which he has assumed to act; that his style and compensation are different from those appraisers who were appointed under that act; that if any office was created, the incumbent was not authorized to discharge the duties pre-

scribed by that act; and, lastly, the appropriation for his compensation being temporary, his office would, by the terms of the act of 3d March, 1853, expire with the current fiscal year, necessarily with the appropriation.

The question, then, is, Was an office, and what office, created by the act of 3d March, 1853? It is a familiar rule in the construction of statutes, that where there are several acts of the legislature *in pari materia*, they are to be construed together when a construction is to be placed upon one of them the language of which is obscure, with a view to ascertain the intention of the legislature in passing the one under consideration. In this case, therefore, the court must look to other legislation of congress on the same subject, when it undertakes to interpret their language in the act of 3d March, 1853.

It is true, the officer whose acts are now assailed, was named and commissioned by the official delegation, appraiser-general," whereas the four officials appointed under the act of 3d March, 1851, are called in the act "appraisers." But they are generally known as, and called, "general appraisers," or "appraisers at large," and are designated so in the brief of the plaintiff's attorney. They have been, doubtless, so called to distinguish them from the local appraisers appointed under other acts of congress, and because their duties under the act of congress under which they were appointed, were of a general character, and did not limit them to one locality in the appraisement of merchandise. Congress themselves have recognized this distinction; for by the 5th section of the act of 16th June, 1855, entitled "An act making appropriations for the expenses of collecting the revenue," when reducing the salaries of officers, it mentions the "general appraiser" (meaning the one whose duties are of a general nature), and the appraiser (meaning the

local one confined to a particular place or occasion). That the act of 3d March, 1853, designated the person to be appointed "appraiser-general," and the appropriation for this compensation would, if not renewed, expire with the fiscal year 1853, are admitted facts. The influence they should exert in the construction of the act, will be hereafter considered.

When this latter act was passed, there were in existence a certain number of appraisers known as "general appraisers," appointed under act of congress approved 3d March, 1851, with duties defined of a general nature, which characterized them and caused them to be designated as appraisers at large, or as general appraisers, to distinguish them from local appraisers, appointed under other acts of congress, or special appraisers; merchants, whom the collector was authorized by existing laws to appoint *pro hac vice*. On the 3d March, 1853, congress, desirous to increase the number of these appraisers, and provide for the wants of the revenue laws on the Pacific coast, enacted that an additional appraiser-general should be appointed. It is a rule of construction in the interpretation of statutes, that no word which is significant is to be repudiated, but to such word its full and appropriate meaning is to be given, and the whole of the language must be so construed "*ut magis valeat quam pereat.*" This rule would be violated should this court strike the word "additional" from the statute, and fail to give it a meaning. Such violation would be gross in this case, where its repudiation would attribute to the legislature an apparent absurdity. Whereas, by giving it an appropriate meaning, and reasonable application, the act of congress can be made intelligible by the application to it of the maxim, "*Id certum est quod certum reddi potest.*"

It is urged, and strongly relied on, as a circumstance which disaffirms the idea that any office was created, that no duties were defined by the act of 3d March, 1853, under which the

appointment of Major Roman was made. This court will not lightly impute to congress an absurdity. The fact that they have directed the appointment of an appraiser, and appropriated $6,000 for his compensation, confirms the conclusion to which the court is arrived. That the appointee had some work to do, is indicated by the language of the act, for by its terms "he is to be employed on the Pacific coast." Congress evidently intended to impose some duties upon him. It is reasonable to consider they were acting from some intelligent impulse, for some practicable purpose; and a fair interpretation and reasonable application of the language of the act show what their purpose was. They were aware, there were at that time in existence, under the act of 3d March, 1851, a certain number of appraisers, discharging the duties prescribed in that act, known generally as general appraisers. When, therefore, they deemed it expedient to add to their number, they considered it sufficient to direct the appointment of an "additional appraiser." Additional to whom? certainly to the four appraisers already in existence, with duties defined. The only difference being, that the sphere of the duties of the additional one should be on the Pacific coast. To what other body of appraisers could he be added? There was no other of the kind known under existing laws. Shall the position of the word "general" after that of appraiser, annul the appointment in face of the plain intention of the legislature indicated by a reasonable construction of their language; and this, by disregarding the meaning, import, and application of one of the most significant words of the act? That fact simply distinguishes him from the local appraisers, and characterizes the general nature of his duties.

The second ground taken by plaintiff's counsel cannot be sustained.

The third proposition is, that the appraisers have added

charges unauthorized by law. There is only one item obnoxious to this objection. After fixing the market or wholesale value of the goods, in the manner prescribed by law, the appraisers have added £43 15s. charged as "transportation to Liverpool and shipping charges;" and the question is, "whether this item constitutes a dutiable charge, which can be added to the market price." No distinction has been made between the "costs of transportation" and "shipping charges." No means, therefore, are afforded to the court to separate the two, and they must be treated, as they have been by the appraisers, as a unit.

Commenting on the act of 3d March, 1851, under which the duties in this case were laid, the Supreme Court say, it "embraces all importations of goods that are subject to an *ad valorem* duty, and directs that the value, or wholesale price, shall be ascertained by the wholesale price at the *period of exportation* to the United States, in the principal markets in the country from which they are imported." The *time* and *place* are distinctly stated, to which the appraisers are to look. (*Stairs* v. *Peaslee*, 18 Howard, 525.)

Prior to the passing of this law, former acts of congress had made the country of production or manufacture the place to which the appraisers were to look; but the act of 1851 will admit of but one construction, and that is, that the appraisement must be made by the value of the goods in the principal markets of the country from which the goods are imported, at *the time* of the exportation of them to the United States. (*Ibid.* 526.)

What markets within that country, [say the Supreme Court], were the principal ones *at the time* of exportation, for an article of this description, was a question of fact, not of law, and to be decided by the appraisers, not the court. . . .

And as the appraisers are by law the tribunal appointed to determine this question, their decision is conclusive upon the importer as well as the government. (*Ibid.* 527.)

In the case at bar, the appraisers have fixed the value of the goods in the manner prescribed by the act of 1851, and added to that value the item objected to. The latter clause of that act directs "that to such value or prices shall be added all costs and charges except insurance, and including commissions, &c.," and concludes by declaring "that the aggregate amount shall be deemed the true value at the port where the goods may be entered, upon which duties shall be levied." This language is similar to that used in pre-existing tariff-laws; but it will be found on examination of the tariff-act of 3d March, 1851, it differs essentially in other respects from these laws, and calls for a different construction.

The interpretation placed upon the laws regulating the collection of duties, has induced the heads of the treasury department to authorize an addition to the value of the goods appraised,—their costs of transportation from the interior of the country to the place of exportation from it.

In 1846, the distinguished gentleman then at the head of the treasury department issued circulars, giving his construction of the then existing tariff laws. The collectors were instructed to include in the "costs and charges," and add to the appraised value "the transhipment, with all the expenses included, from the place of growth, production, or manufacture, whether by land or water carriage, to the vessel in which shipment is made to the United States." The able view of the author of that circular, in favor of his construction of the then existing tariff-laws, has induced his official successors to adopt that construction. It is more than doubtful, if the learned Secretary could have had before him in 1846 the subsequent

act of 3d March, 1851, that he would have placed upon it a similar construction. It is now the duty of this court to construe it. However great its respect for the views of the heads of the treasury department, it cannot substitute their opinions for what it believes the law to be. "Though as between the custom-house officers and the department, the latter must by law control the course of proceeding, yet, as between them and the importer, it is well settled, that the legality of all their doings may be revised in the judicial tribunals." (*Greely* v. *Thompson*, 10 Howard, 234.)

Whether the construction placed by the treasury department on laws existing in 1846, and followed by that department since, is correct, is not a question before us. The single inquiry is, whether a fair interpretation of the act of 3d March, 1851, authorizes the appraisers to add to the market price assessed under that act, the costs of transportation of an article from the place of growth, manufacture, or purchase, in the interior of a country, to the place on the sea-coast whence it is exported?

This cost may have been incurred long before the period of exportation. Can such be added to and included in the charges incidental to the shipment of the goods occurring at the "period of exportation," or as it is expressed by the Supreme Court in the case above cited, at the *time* of exportation?

When, in 1851, congress passed the act under consideration, they intended, and did actually change the manner in which merchandise was to be appraised. Formerly, the appraisers were to look generally to the country of manufacture or growth. By the act of 3d March, 1851, a totally different mode was prescribed, and time and place were distinctly stated. After referring to the provisions of this act, the Supreme Court say, in *Stairs* v. *Peaslee* (18 Howard, 526), "And so far as these

provisions are inconsistent with previous laws, they show that congress had changed its policy in this respect, and intended to repeal the laws by which it had been established." The policy indicated by this last act, is to make the value of the goods what it was in the principal markets of the country at the *time of the exportation* of them. Congress considered that ordinarily, all costs and expenses which had been incurred by placing the goods at a place of exportation, would, by a natural law of trade, enter into the wholesale price of the same kind of goods, in the principal markets of the country; and to get that value, they designated the last moment, the time of exportation. This court does not intend to decide, that charges incurred at the period of exportation, or about that time, incidental to the shipment of the goods, such as port-charges, drayage, &c., may not be added. This question is not directly before the court; but it is united in the conclusion, that charges for the transportation of goods from the interior of the country, by railroad or water-carriage, incurred prior to the time of exportation, cannot be added to the value of goods to be ascertained in the mode prescribed by the act 3d March, 1851.

Since coming to this conclusion, there has been brought to the notice of this court, a case reported in one of the gazettes of Boston, involving the point under consideration. It has not been authoritatively enunciated; but as far as it is entitled to credence, it is parallel with this case. As reported, it is entitled *W. H. Forman* v. *Charles H. Peaslee*, Collector. It appeared, that plaintiff entered into a contract with T. & Co., for the transportation of iron from Wales to the United States; in pursuance of which, T. & Co. employed coasting vessels to bring it from Wales to Liverpool, whence it was transhipped on board their packets for Boston. The court *held*, "the period of exportation," at which the market value was to be

ascertained under the act of 3d March, 1851, was the time when the goods left Liverpool for the United States; that the cost of transportation from Wales to Liverpool is not a dutiable charge, which can be added to the market price. The only difference between that case and the one at bar is, that in the one, the interior transportation was along the coast by water, in the latter, it was by land-carriage from the interior to Liverpool. It is difficult to perceive, how the mode of transportation can alter the application of the principle as to its cost. The secretary of the treasury distinguished no difference when in his circular in 1846, he directed "that the costs of transportation from the interior to the place of exportation should be added, whether by *land or water*."

Another objection urged by plaintiff's counsel is, that the costs and charges in this case were made by the appraisers, and not by the collector. The act of congress requires in general terms they should be added; but does not state by whom. Now, if added by the appraisers, under the authority and approval of the collector, it is a sufficient compliance with the law. But it is unnecessary to decide this question, as we place the disallowal of the charges on the ground that the costs of interior transportation which accrued previously to the period of transportation, are not dutiable under the existing act.

The next proposition relied upon by plaintiff is, that the appropriation for compensation of the incumbent of the new office was temporary, and for the fiscal year 1853; and that the tenure of the office expired with the appropriation. If the office was, as this court has decided,—created, it has not been vacated even if it be admitted that the appropriation was not renewed; though it must be admitted that most aspirants look to salary as the most important part of the office. But the tenure of office depends upon the nature, character, and

extent of its duties, upon the language of the act which creates it, and the terms of the commission held under it. The act, in this case, directed the appointment to be made by the president, with the advice and consent of the senate; and the law annexed to it by implication a like term with those held by similar officers. The commission prescribed the tenure of the office to be during the pleasure of the president for the time being.

The act directed the appointment of an additional appraiser general, and the use of the word "general" clearly indicates the general nature of his duties. When he was appointed as additional appraiser, he became one of the body already created, and stands on an equal footing with them as to tenure of office. There is a class of cases in which a temporary appointment might be inferred, on the ground that a temporary compensation had been made; and that inference would be aided by the nature and character of the duties to be discharged. When, for instance, a special mission was created to accomplish a particular object, which, from its nature, it was reasonably to be supposed was to be accomplished forthwith, or not at all; the fact that a specific sum was appropriated with the character of the service, might indicate that the office was to expire with the appropriation. The principle of such a class of cases is not applicable to the case at bar.

The only ground taken by the plaintiff in this case, which the court can sustain, is the objection made to the item of additional charges.

A judgment, therefore, will be entered for the plaintiff for the amount of the rejected item, and submitted to the court for its inspection and approval.

Cyril V. Grey for plaintiff.
P. Della Torre for defendant.

BYRD *et al. v.* BADGER.

Circuit Court, U. S., July Term, 1858.

The proceedings supplementary to execution, as prescribed by the practice act of this State, are evidently a substitute for the familiar mode in the practice of a court of chancery, known as a creditor's bill.

The present movement is an attempt to confound in this court the distinction between equitable and legal remedies; and this court does not consider that this statutory remedy can be used in this tribunal, without disregarding the distinction which exists in it between the exercise of its common-law and equity jurisdiction.

On motion to set aside an order previously entered, on the ground that it had been improvidently granted by the court.

McAllister, J.—The proceedings supplementary to an execution against a judgment debtor, provided by the 238th section of the practice act of this State, is evidently a new statutory remedy. They are a substitute for a creditor's bill, and in substance constitute an equitable proceeding. (*Sale* v. *Lawson*, 4 Sandford, 718.) They not only constitute such proceeding, but a new suit, and as such comes appropriately—and so far as the right it seeks to vindicate, and the remedy it aims to obtain, most appropriately—within the jurisdiction of a court of chancery. "An order for the examination of a judgment-debtor is not a mere process to enforce the judgment alone, but the statement of new facts, which the plaintiff must

prove to entitle him to the relief sought. As a substitute for a creditor's bill, it is a suit," &c. The statute of New York is analogous to our own. It having been construed to constitute a new suit, and to be a substitute for a creditor's bill, the same construction may be reasonably placed upon the statute of this State, when the jurisdiction of this court iu relation to the proceeding, is in question. So considered, the sole object of the statute must be deemed to give a legal remedy for an equitable one. Such legislation cannot affect the jurisdiction of this court. In *Robinson* v. *Campbell* (3 Wheaton, 212), it has been decided that the fact that a State has allowed, by statute, a creditor to proceed against the person of his debtor by a peculiar process, will not affect the jurisdiction of this court to entertain cognizance of a bill in equity having the same object. (*United States* v. *Howland*, 4 Wheaton, 108.) The examination of a judgment-debtor being the substitute for a creditor's bill, and having for its assertion equitable rights, the action of the State legislature cannot so far affect the equity jurisdiction of this court, as to convert it into a common-law jurisdiction, by enabling a party to pursue in it an equitable right in any way contrary to the established practice and proceedings of chancery. The courts of the United States have a like jurisdiction in every State; and the judiciary act of 24th September, 1789, confers the same chancery powers upon all, and prescribes the same rules of decision to all. (*United States* v. *Howland*, 4 Wheaton, 108, 114.) This could not be the case if State legislation could mould their practice and proceedings so as to annul all distinction between legal and equitable rights and remedies in the administration of justice; so carefully preserved by the laws of the United States. Our State statute indicates that in some cases under it a receiver may be appointed, and an injunction—or what is

equivalent thereto, an order to enjoin the transfer of property —may be granted. These are the peculiar instruments of a court of equity in the exercise of that jurisdiction, which cannot be enlarged, diminished, or controlled by State legislation. (*Boyle* v. *Zacharie*, 6 Peters, 654.) If, then, the pursuit of a judgment-debtor for the relief sought, is the assertion of an equitable right, this court can aid the party only when he shall appeal to its chancery powers. In *Bennett* v. *Butterworth* (11 Howard, 669), the principle is enunciated, that a court of the United States sitting in a State where the distinction between law and equity does not exist, may adopt the State proceedings to try suits at law; but equitable rights must be presented and tried according to the rules prescribed by this court for the pleadings and practice in equity.

In view of these principles, it is clear that the order heretofore made in this case was improvidently granted. It was the exercise of an equitable jurisdiction on its common-law side. Reliance has been placed by plaintiff's counsel on the third section of the act of congress, passed 19th May, 1828 (4 Statutes at Large, 278), which declares "that writs of execution, and other final process issued on judgments and decrees rendered in any courts of the United States, and the proceedings thereon, shall be the same, except their style, as in the State Courts." This law extends only to all the ministerial acts of a sheriff in levying, advertising, selling, &c., whose action is to govern the marshal in his proceedings on final process out of the United States courts. In *Amis* v. *Smith* (16 Peters, 312), the construction of this section of the act of 1828 will be found. After referring to writs of execution, the court comment upon the words, "and the proceedings thereon," and understand them to mean the exercise of all the

duties of the ministerial officers of the States, prescribed by the laws of the States for the purpose of obtaining the fruits of the judgment. Now, the examination of a judgment debtor is not the proceeding of a ministerial officer, or a proceeding on the execution. For this reason, independently of others, this case cannot be considered as coming within the operation of the third section of the act of 1828. If additional authority be needed on this point, it will be found in a decision of the Supreme Court of this State. In the case of *Adams* v. *Hackett* (7 Cal. 201), in construing the section of the law under consideration, that court say, "In reference to the chapter prescribing the mode of proceeding supplementary to an execution, it seems clear that those proceedings were intended as a substitute for what was called a 'creditor's bill.' This is so stated by the practice commissioners" in their report on the New-York Code. Thus regarded it is an equitable proceeding, and only cognizable in this court in the exercise of chancery powers.

The distinction between common-law and equitable remedies, created by acts of congress, and carefully preserved by the decisions of the Supreme Court of the United States, must be maintained in this tribunal. In *Amis* v. *Smith* (16 Peters, 314), it is said, it is the duty of this court "to preserve the supremacy of the laws of the United States, and which they cannot do without disregarding all State laws and State decisions which conflict with the laws of the United States."

The 56th rule of this court is conclusive upon this point. It provides, that nothing in the acts of the legislature adopted by this court in its common rules, shall be so construed as to authorize the enforcement of a merely equitable right on the common-law side of this court.

The order for the examination of the judgment debtor, heretofore made in this case is hereby set aside on the ground that it was improvidently granted.

W. W. Crane, for plaintiff.
Crockett, Baldwin & Crittenden, for defendant.

THE UNITED STATES *v.* PARROTT *et al.*

Circuit Court, U. S., January Term, 1859.

A MOTION for the appointment of commissioners to take testimony abroad, is not grantable of course.

Special motions, unlike those grantable of course, require allowance by the judge, and previous notice to the adverse party.

The power to grant a *dedimus potestatem*, is given to the federal courts, to prevent the failure of justice, to be exercised according to "common usage."

Where motion is made to a court of equity, the usages and rules of chancery must apply.

The practice and jurisdiction of this court, as a court of equity, cannot be controlled by the practice of the state courts.

The materiality of the testimony, and the purposes for which it is invoked, will determine the action of the court.

An application made to the court for a *dedimus potestatem* to take testimony abroad, was refused.

MCALLISTER, J.—In this case a bill was filed by the district attorney of the United States, in behalf of the government. Among other matters, it alleged that the title to the premises

in dispute was in the United States; that defendants had taken tortious possession of them; that they consisted of a mine of great value; that defendants had extracted minerals therefrom to the value of $8,000,000; that they were extracting therefrom minerals to the annual amount in value of $1,000,000, and threaten to continue the waste; that they were unable to respond for the damages which had already accrued, and which would still accrue; that the defendants, in the name of one Andres Castillero, had presented a petition to the "Board of Land Commissioners," under the act of congress approved March 3d, 1851, which was pending on appeal from the decision of the commissioners, before the District Court of the United States for the Northern District of the State of California, the object of which petition was to obtain from the United States a confirmation of the title which they pretended to hold from the Mexican government; that the title under which they held possession was forged, ante-dated, and fabricated in pursuance of a conspiracy to cheat and defraud the United States of their rights to the said property. The bill concluded by charging that defendants were destroying the substance of the mine, and prayed that an injunction might issue to stay the waste defendants were committing, and threatened to commit, until the determination of their alleged title by the tribunals to which the adjudication of it was confided, and that a receiver be appointed. To this bill an answer was filed, and on the bill and answer the motion for injunction was argued and decided. The charges in the bill specifically made, of forgery, and ante-dating of the documentary title under which defendants held, were not directly and fully denied; all that was averred was the ignorance of defendants of their existence, and their belief of the genuineness of the documents. In relation to the charge made in the bill of a conspiracy to cheat and defraud the

United States, after admitting the genuineness of all the letters save one, appended to the bill, the answer, in response to the allegation of conspiracy, denies "that the said letters and communications were written by the said parties with intent to commit a fraud, or in furtherance of a conspiracy to fabricate a title, as charged in said bill, except so far as the said intention appears from said letters on the part of the said James Alexander Forbes." So far, then, as the intention of conspiracy appears from the letters, it was admitted that "Forbes," under whom two of the defendants claimed, may be guilty. In view of the insufficiency of the denials in the answer, the irreparable character of the mischief complained of, and the prima-facie title of the complainants exhibited by the bill, answer, and exhibits, the court granted the injunction, and refused the appointment of a receiver.

The well-settled rules of chancery require that full, direct, and positive denials should have been given to the charges of fraud, forgery, ante-dating, and conspiracy. This doctrine is enunciated by uniform decisions. (*Poor* v. *Carleton*, 3 Sumner, 77; *Clark's Executors* v. *Van Riemsdyk*, 9 Cranch, 160; *Everly* v. *Rice*, 3 Green Ch. R. 553; *Roberts* v. *Anderson*, 2 Johns. Ch. R. 202; *Apthorpe* v. *Comstock*, 1 Hopkins, 143; *Ward* v. *Van Bokkelen*, 1 Paige, 100.) Independently of authority, reason and common sense affirm the propriety of the rule. The facts charged in the bill were forgery and ante-dating. These were not denied, but the ignorance of the defendants of their existence and their belief in the non-existence of them averred. In *Roberts* v. *Anderson* (2 Johns. Ch. R. 202), Chancellor Kent has well said, "The defendants may have given all the denial in their power; but the fraud may exist notwithstanding, and consistently with their ignorance, or the sincerity of their belief."

It has been suggested, that the allegations of the forgery and ante-dating not having been sworn to from personal knowledge, *that* circumstance should modify the rule. No authority has, nor it is believed can, be invoked to sustain a proposition so novel.

The allegations of a bill properly made, which so clearly charge the fraud as to make it perfectly intelligible to the defendants, entitle the complainant to such a denial as is prescribed by the rules of chancery. If such an one is not put in, the defendant cannot arrest the issue of an injunction on the ground that he has filed an answer denying the equity of the bill. Relax that rule, and what mght not be the injurious results?

There are many cases in which rights may be violated under circumstances which may warrant an honest belief that atrocious fraud had been perpetrated; but those circumstances may have transpired at a distance from the party, and he unable to swear to them from personal knowledge. Can it be contended with any reason, that when the party comes into a court of equity, that tribunal will award to an answer whose denials of forgery and ante-dating are made "upon information and belief," the character which the law annexes to an answer where the denial of the fraud is on personal knowledge? The allegations of a bill, are mere pleadings; the averments in an answer responsive to them, are regarded as evidence equivalent to two disinterested witnesses, or one witness and strong corroborative circumstances.

To consider that the denials of an answer on "information and belief" are to be deemed sufficient because the allegations of the pleadings are not sworn to from personal knowledge, is simply to confound the distinction which exists between pleadings and evidence. So to modify the rule, would exclude any

application by way of information, through its officer, by a government. To every such application an answer on "information and belief" would be sufficient, for personal knowledge of facts is not to be expected from the government. Deeming the rule applicable to this, as it is to all similar cases, the court considered that the denials of the fraud, ante-dating, and forgery were not such as ought to arrest the issue of an injunction; that the case was one of irremediable mischief; and lastly, that the pleadings and exhibits in the case showed a probable foundation to entitle the complainants to be protected against that irreparable mischief, until the determination of the question of title in the tribunal in which it was pending,—this court, without pausing to dwell upon the title set up by defendants, independently of any alleged forgery of it, directed the injunction to issue, but declined for the present the appointment of a receiver.

The injunction exists, the issue of title is still pending in the District Court, there is no suggestion of any fact that has arisen since the decision of the court to change the relative attitude of the parties from what it was at that time, nor to alter the jurisdiction of the court in any way over the case. That jurisdiction was distinctly enunciated to be confined to granting the prayer of the bill, the court disclaiming at the same time all power to decide upon title, either on a motion to dissolve an injunction, or on a final hearing.

In this condition of things, an application is made to this court to designate commissioners to take testimony abroad. The facts expected to be proved go mostly to the establishment of the title of the defendants, and the genuineness of the documents by which they propose to sustain that title. The avowed object of invoking that testimony, is "to offer it in evidence on the trial of this case, or on a motion to dissolve the

injunction which has been granted against the defendants therein, or for any other purpose in said cause to which such evidence shall be applicable."

The grounds taken in support of this motion are,—1st. That it is matter of right, grantable of course ;

2d. That the materiality of the testimony invoked, whether there is to be any hearing at all in the case, whether the testimony would be hereafter admissible, are all matters to be considered when the evidence is offered, not by anticipation. If the first proposition be correct, the second follows as a corollary from it.

The first ground which claims the action of this court as matter of right, and the granting of the application as matter of course, presupposes the act of the court to be merely ministerial. If this be so, it has no right to investigate whether the testimony be material, or whether it can be used when obtained. All it has to do, is to perform the mere ministerial duty which it is commanded to discharge, and the present application is needless. Whence the necessity of naming witnesses, the facts they are expected to prove, and the purpose for which their testimony is invoked, if this motion is grantable as a matter of course? Both these grounds will be discussed together, for each is involved necessarily in the other; for if the granting a "*dedimus potestatem*" is matter of course, the court has nothing to do with the materiality of the testimony, the use to be made of it, or any other matter connected with it. If, on the contrary, the power of this court to grant this application depends upon the materiality of the testimony, and the purposes for which it is invoked, it is evident that neither ground can be tenable.

To sustain the proposition that the granting of the present application is matter of right, reference is made to the 67th

rule governing equity practice, as amended in 1854, by the Supreme Court of the United States, and to the 5th section of the act of congress of 22d August, 1843.

By the 67th rule it is provided, that after a cause is at issue, commissions to take testimony may be taken out in vacation, as well as in term-time upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice being given to the adverse party to file cross-interrogatories before the issuing of the commission, &c. And the rule provides that in all cases the commissioners shall be named by the court, or a judge thereof. The amendment to this rule, to be found in 17 Howard, p. vii. declares that the presiding judge of any court exercising jurisdiction, either in term-time or vacation, may vest in the clerk of said court general power to name commissioners to take testimony in like manner that the court or judge can now do by the 67th rule.

The presiding judge of this court has never vested in the clerk any such power. We must look, therefore, to the former rule, the construction of which will necessarily determine the extent of any power which the judge could have delegated to the clerk; for the judge could not have delegated any power which he did not himself possess, and which by the requisitions of the amended rule was to be exercised by the clerk in the same manner as it could be by the judge. The fifth section of the act of 22d August, 1843 (5 Statutes at Large, 517), provides, that the District Courts as courts of admiralty, and the Circuit Courts as courts of equity, shall be deemed always open for certain purposes, and that it will be competent for any judge at chambers, and in vacation as well as in term-time, to award all such process, commissions, rules, and proceedings, &c., *whenever the same are not grantable of course*, according to the rules and practice of the court. It is evident,

then, from the act, that all commissions are not granted of course. Looking through the equity rules, it will be found that a distinction is preserved between special motions and those grantable of course.

What constitutes a motion grantable of course, and a special one, is to be inferred from the 5th rule of equity. The distinction is, that a motion which requires an allowance from the judge or a notice to the opposite party is a special one; all others are grantable of course.

This motion asks for the interposition of the judge to nominate commissioners, and requires that previous notice of ten days should be given.

In addition to foregoing rules and act of congress, reference has been made to Daniel's Ch. Practice, 1099, where that author discusses the question, what facts are necessary to be inserted in the affidavit on which the application for a commission is founded, and shows it is from the authorities, uncertain whether the names of the witnesses, or a statement of the points to which it is intended to examine them, are necessarily to be given in the *affidavit*. In relation to the names of witnesses, he states that according to the books of practice all that need be stated in the *affidavit* is, that the testimony of some of the witnesses whom it is proposed to examine is material, and that the party cannot proceed to trial safely without their testimony. He further states, when the application is made in an early stage of the case the court seldom denies the application for a commission; it will, however, exercise a discretion upon this subject, and he gives various instances where such applications were refused.

As to the necessity of stating the *facts* to be proved, or the names of the witnesses in the *affidavit*, the conclusion to which he comes, after a review of the authorities, is, that in order to

dispense with the necessity of stating them in the *affidavit*, the names of the witnesses, and the object to which their testimony is required, and the necessity for examining witnesses abroad, must be evident from the *pleadings*, if not made so by the *affidavit;* and he distinctly states, that the reason why Lord Eldon, in the case of *Montizibel* v. *Machada*, did not require those matters to be stated in the affidavit, was, that his Lordship had looked into the case, as made by the pleadings, in order to see whether there were facts to which it was proper to examine the witnesses. The same author tells us, that it must appear that the facts relied on as to which evidence is sought, are such as can be made use of, either in support of the action or in defense of it. (Daniel's Ch. Practice, 1096.)

The foregoing authorities (all that have been cited by counsel) do not sustain the proposition asserted.

There are but two sources of power to which this court can look for its action to obtain the testimony of absent witnesses.

The first is by the issue of letters rogatory. There is no instance on record of these having been issued as a matter of course, nor is the present an application for such.

The second source is statutory; nor can this court receive any aid, save by implication from that source.

The two acts of congress upon this subject, are those of 24th September, 1789, and 24th January, 1827. The former, after describing minutely the mode of taking depositions *de bene esse*, limits the execution of commissions to an American magistrate. The latter act (1827) is limited in its terms to the execution of commissions within the limits of the United States and their territories. It would be a strange state of things, that without any express legislation as to the mode and manner of issuing commissions, parties would have the right to consider the issue of a commission to take testimony abroad grantable

of course, and the nomination of commissioners a mere ministerial act by the judge. The only source of power to which this court can look, is the 30th section of the Judiciary Act of 1789 (1 Statutes U. S. 90); and from it derive that power by implication. That section provides, "that nothing herein contained shall be construed to prevent any court of the United States from granting a *dedimus potestatem* to take depositions according to common usage when it may be necessary to prevent a failure or delay of justice." This act, like all laws made in derogation of the common law, should be strictly construed. No commission should be issued under it, unless necessary to prevent a failure or delay of justice, or in accordance with *common usage*. What is meant by common usage, when an application is made to a court of equity for a *dedimus potestatem* to authorize the taking of testimony abroad? It has been contended on this motion, that by the terms "common usage" in the statute of 1789, congress must have meant the practice of the courts of the States; and the case of *Buddicum* v. *Kirk* (3 Cranch, 293) has been cited to sustain this proposition.

It is true that Conkling, in his treatise (p. 421), states that the above case enunciates a proposition which he embodies in these words: "The circumstances under which a commission will be issued, and the mode of obtaining, executing, and returning it, in the several districts, depend upon the practice and laws of the respective States, and the rules of the several courts of the United States." If this text-writer intended to say that the rules of chancery, in relation to taking testimony abroad, were to be in accordance with the practice and laws of the different States, he asserts a doctrine totally indefensible. If such was his intention, his ingenuity has detected in that case what has escaped the sagacity of Mr. Justice Curtis; for the latter, in his head-notes (1 Curtis, 584), has failed to per-

ceive, for he does not notice, any such doctrine. The case of *Buddicum* v. *Kirk* was a common-law case, and the question arose, whether service of a notice to take a deposition upon an attorney at law was equivalent to one upon an attorney in fact? As the law of Virginia required the notice to be made on the attorney in fact, the court, very properly, under the 34th section of the judiciary act, adopted the law of the State in a common-law case. That case is no authority to sustain the proposition that the practice of this court acting as a court of equity, is to be controlled by the practice of the State courts, whatever that may be. It would make the chancery jurisdiction and practice of the federal courts subservient to the practice of the courts of every State in which the federal court might sit; whereas, it must be uniform in all the States. In *Gaines* v. *Relf* (15 Peters, 9), this question is fully discussed, and even in Louisiana, where there is no equity State court, it was decided that chancery practice prevails in the Circuit Court of that State, and must prevail in accordance with the rules prescribed by the Supreme Court, and where they are silent, according to the practice of the High Court of Chancery.

The question then arises, whether an application to a court of equity to take testimony abroad is grantable of course, and all considerations of the materiality of the testimony invoked, and the purposes for which it is sought, are to be postponed until the testimony is offered as evidence? Authorities have been cited to sustain the position, that a party has a right to move to dissolve an injunction, and even to renew such motion. This is doubtless true; but the right to make any number of such motions does not alter the nature of the evidence proposed to be offered to sustain them, or fix the propriety of granting the application to take testimony abroad. These are

to be controlled by the usages and rules of a court of chancery.

The *proviso* to the 30th section of the Judiciary Act of 1789 (1 Statutes U. S. 90) gives the power to issue a *dedimus potestatem* according to "common usage." When an application for such process is made to a court of equity, that common usage is to be ascertained by reference to the usages of chancery. One of the fundamental principles which controls that court is, that as its object in compelling a discovery, or granting an application for a commission to take testimony abroad, is to enable itself, or some other court, to decide on a matter in dispute between the parties, the discovery or testimony sought must be material *to the relief prayed for*, or material to be used in some other suit actually instituted or proved to be capable of being instituted in another *forum*. If, therefore, the party does not show the testimony he seeks is material to enable him to support or defend a suit, he shows no title to what he seeks; and, consequently, if he seeks it by bill a *demurrer* will lie, if he seeks it by motion he is not entitled to it. Such is the doctrine ennunciated by *Lord Redesdale* (Mitford's Ch. Pl. 192).

It is illustrated by decided cases, *Daniel* in his treatise cites from the case of *Shedden* v. *Baring* (3 Anst. 880), to sustain the proposition that a bill for discovery or a commission to take testimony abroad must not only show that the action has been brought, but it must show that the facts relied on as to which evidence is sought are such as can be made use of, either in support of the action or in defense of it; otherwise, the bill will not lie. In England the usual mode is to apply by a bill for a discovery and a commission to take testimony abroad, or to take testimony abroad only. "A bill of this kind [says Daniel], for the mere purpose of examining witnesses abroad, is subject to

nearly the same rules as bills for discovery in aid of an action at law." (Daniel, 1096.) There can be no stronger proof that an application to take testimony abroad is not matter of course, but is an application to the judicial discretion, than the fact that the ordinary course in England is to apply by bill in equity to obtain it. In *Lousada* v. *Templer* (2 Russ. 561–564), *Lord Eldon* says "that though the circumstances were such that even if the plaintiff at law had obtained a verdict, he could not allow him to receive the money until it was ascertained what had been done in Peru, yet he would not grant commissions in aid of a defense to an action when he was not satisfied that the facts alleged as a defense would constitute a legal defense to the legal demand." The court (he added), ought never to grant a commission without examining strictly what is the state of the pleadings." It is evident from this statement of the lord chancellor, that when after his retirement from office he gave an opinion, as stated by Daniel, that the witnesses' names need not be inserted in the *affidavit*, he did not intimate they and the other facts were not necessarily made to appear in the pleadings and by other means.

In the case of *Martin* v. *Nicholls* (3 Simons, 458), there is a strong illustration of this doctrine. The principle asserted is, that a bill for discovery against a defendant, and a prayer for a commission to take the examination of witnesses, is *demurrible*. The facts in the case were, that a bill was filed alleging that a judgment had been obtained against complainant in Antigua, on which an action was pending in England against the complainant. It set forth certain facts to show the foreign judgment was void, prayed a discovery against the defendant, and stated that without proof of such facts the complainant could make no defense at law; it prayed also, that a commission might issue to take the testimony of

witnesses at Antigua, and other places beyond sea. A *demurrer* was filed. The court after deciding (correctly or not is not the inquiry), that to the foreign judgment the facts if proved could not constitute a defense, for that reason sustained the *demurrer*. The chancellor said, "If I were to allow this bill to stand, I should be in effect saying, that the judgment obtained in 'Antigua' may be overruled in the Court of Common Pleas." In the language of the chancellor in that case, this court may say, that if they allow the present application, so far as the evidence as to title goes, that it is in effect to say it has the right to try title.

Lord Eldon has said, as we have seen in *Lousada* v. *Templar* (2 Russ. 561), the court ought never to grant a commission without strictly examining the pleadings. This is for the purpose of ascertaining the issue to be tried by the court, and the materiality of the testimony to try it. When we look at the pleadings in this case, we find the relief prayed for is the issue of an injunction to arrest the destruction of property until an adjudication of it has been made by the tribunals to which it has been confided by law. The whole structure of the bill assumes the ground, and upon it asks the relief prayed, that the District Court has sole jurisdiction between the parties on the question of title, and that all the power of this court is limited to granting an injunction, and thus extending a relief not within the sphere of the District Court. In the answer, a *demurrer* is incorporated, which assigns as one of its grounds, that it appears from the bill itself, that no other than the District Court can entertain jurisdiction of said claim. It has been contended throughout, by the defendants, that this court could not adjudicate upon title, it being within the sole jurisdiction of the District Court, and that circumstance assigned as a reason why this court could not entertain jurisdiction of this

bill, which asks for the issue of an injunction. The court, by decreeing the relief prayed for, asserted jurisdiction over the injunction, although it disclaimed all power to decide title. They did so, upon the ground that a court of equity would provide for the safety of property in dispute, pending a litigation, and sustained the position by reference to the action of the English Chancery in relation to the preservation of property in dispute in the ecclesiastical courts. Now, the pleadings in this case are not changed; the issue is the same; title is no more now in issue in this court than it was; the jurisdiction of this court over this case is in no ways altered, increased, or diminished.

Under these circumstances, application is made to obtain testimony from abroad which relates to the title of defendants, to be used on the trial of this cause, or upon a motion to dissolve the injunction which has been granted. It is the ordinary practice of a court of chancery to dissolve an injunction already issued, after answer filed; and there is no objection to the renewal of such motion upon new and material testimony which would be admissible as evidence on the issue pending between the parties. Indeed, such motion may arise on any new matter which may have arisen since the issuing of the injunction. For instance, the injunction issued in this case has been granted to preserve property, the title of which is pending in another court. This tribunal will watch the conduct of the parties, and continue or dissolve the injunction, as the justice of the case may demand. If the conduct of the complainants be such as to intimate a desire to delay or postpone the trial of the title, this court would, upon motion, dissolve the injunction and dismiss the bill. If, on the other hand, the conduct of the complainant be such as evinces a desire to go to prompt trial of the title, the injunction would be continued until the determin-

ation of the title by the courts to which it was confided by law. If that determination be in favor of defendants, a dissolution of the injunction would be decreed, and the bill dismissed. If in favor of complainants, it is unnecessary to prejudge the action of the court. But the result must be in one event, to decree a perpetual injunction; and in another, to dissolve the injunction, restoring the parties to their former relative position and respective rights, the court having accomplished its object—the preservation of the property pending the dispute. Whether a perpetual injunction be granted or the bill dismissed, the decree will be final on the only issue of which this court has jurisdiction.

Upon the ground, then, that the court has no jurisdiction to try title, and that it would be the assertion on its part of the right to do so if this application were granted; that the evidence as to title cannot be used in this court,—this tribunal in the exercise of the discretion reposed in it, as controlled by the usages and principles of a court of chancery, is constrained to deny the present motion.

But there is another aspect in which this case must be viewed, and which must also control the discretion of the court. Whatever may be the legal effect of the adjudications of the tribunals to whom the question of title is confided by law, upon the rights of third parties, who have conflicting claims to the property disputed, and who were not parties to the proceedings in those tribunals, there can be little doubt, that, as between the claimants under the act of 3 March, 1851, (9 Statutes U. S. 631) and the government of the United States, the provisions of that law cannot be disregarded by this court. By that act, congress prescribed the agencies, manner, and conditions on which the government consented to be sued, and through which, in which, and upon which they would surren-

der the legal title which had become vested in them by the treaty of Guadalupe Hidalgo, to such as established a better title, in accordance with the provisions of that law.

By it, that body delegated to certain special tribunals the adjudication of title, and limited the manner in which they were enabled to act, taking every precaution by the provisions of the law, to guard against fraud and imposture. The power of this court, as one of chancery, to grant injunction, and the application by the United States for such process, gives no additional jurisdiction to this court, nor confers power, beyond that which it has exercised as a court of equity, to preserve the substance of the property. To grant this application, would (to use the language of the chancellor, in *Nicolls* v. *Martin*, 3 Simons, 455, as we have seen) be in effect saying, that this court has jurisdiction to try title, and, consequently, to give relief if decided in favor of the defendants.

Was it within the power of congress to pass the act of 3d March, 1851, or is it in conflict with any clause in the constitution of the United States?

In the case of *West* v. *Cochran* (17 Howard, 415) the Supreme Court of the United States enunciate the following principles. "It was also competent for congress to provide, that before a title should be given to any one, the exact limits of his possession, and the title which the United States was to give, should be defined, and that this should be done by such agencies, and in such manner, as might be fixed by congress. This is in entire accordance with the provisions of the treaty, which guarantees to the inhabitants the rights of property secured to them; but it was not intended to provide for the particular modes and instrumentalities by which such rights should be ascertained and enforced,—these being left to the nation to whose powers

they were confided; so that the question is, What has congress deemed expedient?"

Now, to ascertain what has been done in this case, we must look to the act of congress passed March 3, 1851 (9 Statutes at Large, 631), entitled "An Act to ascertain and settle the private land claims in the State of California."

By it, they have confined exclusively to certain tribunals, the adjudication of title, with specially delegated powers, and which, not being courts of general jurisdiction, can exercise none not expressly granted, or directly and necessarily derived by implication. So far from conferring authority upon them, to send process to a foreign country, to procure testimony, a power exercised by courts of general equity powers, as we have seen with great caution, congress have excluded a conclusion that any such power can exist, by enacting that "no deposition taken by or in behalf of any such claimant, shall be received in any case, whether before the Commissioners, or before the District or Supreme Court of the United States, unless notice of the time and place of taking the same shall have been given in writing to said agent, or to the district-attorney of the proper district, so long before the time of taking the deposition, as to enable him to be present at the time and place of taking the same; and like notice shall be given of the time and place of taking any deposition on the part of the United States." The introduction of this clause into the act, is a clear expression of the determination of congress, when they gave their consent that the government should be sued, that her rights were not to be affected by any deposition or testimony in writing, save such as had been taken in the presence of their agent, or of the district-attorney of the proper district.

Now, that clause in the law may have been "gross injust-

ice" or "oppression," and a refusal on the part of the present administration to amend the law, may be an "iniquitous attempt to suppress the means of truth," as zealously urged by one of the solicitors of those who are making this application. Congress may, however, have been impelled by what they deemed legitimate and prudent precaution to shield the rights of the government from the dangers of testimony taken in a foreign country, among a people who had just ceased to be avowed enemies of this country, without the checks and sanctions thrown around the proceeding by the presence of the agent of this government, and by the execution of the commission before an American functionary. The present administration may have been actuated by the same motives in refusing to amend the said act, as has been urged.

The general rule is, however, "that if the motive and design of an act may be traced to an honest and legitimate source, equally as to a corrupt one, the former ought to be preferred." *Arredondo's case* (6 Peters, 716).

But with the motives of the government which passed the law, or the present administration which, it is urged, has declined to aid in its repeal, this court has nothing to do. Such legislation, if it be as represented, does not conflict with the constitution of the United States; and the highest tribunal in our country has decided that it is competent for congress to regulate the manner and agencies by which the title of claimants to lands shall be ascertained, and that such legislation does not violate any rights intended to be secured by the treaty. The conclusions to which the court has come, are:

1st. That an application for the appointment of commissioners to take testimony abroad is not grantable of course; but it is addressed to the judicial discretion which is controlled

by the usages and rules of chancery practice, in accordance with which the present motion cannot be granted.

2d. The act of 3d March, 1851 (9 Statutes, c. 31), cannot be disregarded; and this court ought not to violate the spirit and policy of that act, by granting its process to take testimony abroad, to be used in the trial of title in this cause.

The motion, therefore, must be denied.

P. Della Torre, Dist. Att'y U. S.

Edmund Randolph, and *Edwin M. Stanton*, for complainants.

A. C. Peachy, *Gregory Yale*, and *Hall McAllister*, for defendants.

BARQUE "YANKEE" AND SMITH, *Appellants*, *v.* GALLAGHER, *Appellee.*

Circuit Court, U. S., January Term, 1859.

WHERE a *tort* is a continued act and not separable, and a portion is committed on land and the remainder on the high seas, the jurisdiction of it attaches to the common-law courts.

But if the tortious act originates in port, and is not a perfected wrong until the vessel leaves the port, it is a continuous act and travels with the *tort-feasor* and the injured party during the whole voyage, and comes within the jurisdiction of the admiralty upon the principle enunciated in certain cases, that if a thing be taken on the high seas and brought to land, it is appropriate to a court of admiralty to decide the question as a *marine tort.*

The *torts* in this case having been committed by different persons, and in different places, are separable.

The action for the trespasses committed by the parties on land is cognizable in the courts of common-law.

That committed by the party now sued, is within the jurisdiction of admiralty as a marine *tort.*

It originated on waters within the ebb and flow of the tide within the admiralty jurisdiction, and was continued on the high seas.

Such locality gives the jurisdiction.

The law implies a corrupt motive in the perpetration of a tort by one who commits it in the departure from a known duty and in wanton violation of law.

In cases of contract the motive of defendant is not inquired into, to increase the compensation to be made by him.

In *torts* the malicious intention may be said to increase the injury.

This is an appeal from the District Court of the United States for the Northern District of California.

A libel was filed in the said court *in rem* and *in personam*, and objections filed to the jurisdiction of the court.

The exception to the jurisdiction *in rem* was sustained; and the jurisdiction as to the proceeding *in personam* was maintained, and the exception to it overruled.

The court rendered a decision on the merits, against the respondent, for the sum of three thousand dollars; from which the present appeal has been prosecuted.

McAllister, J.—The two questions which arise are—

1. As to the jurisdiction of this court of the present proceeding *in personam.*

2. As to the amount of damages.

The libel propounds that on the 25th May, 1856, in the city of San Francisco, while engaged in the discharge of his duties as night watchman, in the service of the government of the United States, at about 8 o'clock P. M., libelant was seized upon by armed men; that he represented to them that he was in the discharge of his duties as a watchman in the employment of the United States; that, notwithstanding, he was compelled to accompany his captors; that they carried him to a place in the city of San Francisco known as the Vigilance Committee-rooms, where he was delivered to another body of armed men, and by them confined in a cell. After remaining there several days, without being informed of any charge of any specific offense; without having been confronted with any accuser or witness; a document was read to him which he was told was his sentence, in the following words: "You, Martin Gallagher, are a rioter, or disturber of the public peace, a promoter of quarrels at the polls on days of election. You are a bad man, and you are banished from the State of California, never to return under the severest penalties."

That, about midnight on the 5th June, 1856, a party of armed men came to the cell where libelant was confined, put irons upon him, took him to the rear of the building, where they were joined by a larger party of armed men, who directed that no noise or speech should take place, marched him with other prisoners to California-street wharf, and put them on board a small "tug" called the Hercules, with a guard of armed men. The "tug" ran alongside the ship Carrier Dove, towed her to sea, returned and "lay to" on the bar; that when the Yankee, standing out to sea, came opposite the Hercules, she "hove to," and the armed men on board the Hercules compelled libelant to get with others into a small boat, in which they were conveyed on board the Yankee, of which the respondent was at the time master. The small boat remained so short a time alongside the Yankee, that, in the language of one of the respondent's witnesses, "there was not time to speak half a dozen words from the time they came on board until I left in the boat."

The Yankee went immediately to sea, and the libelant was carried off, and landed on a foreign shore in the Sandwich Islands.

Of the truth of the foregoing facts there can be little doubt. Several witnesses who had been members of the Vigilance Committee, among them George R. Ward, who is stated in the libel to have been the person who announced to the libelant, in his cell, the so-called sentence, were sworn, and still no material fact of the foregoing is denied by any one of them.

That sentence is ascertained to have been issued by a body of men authorized by no law, and who substituted their private judgments for the action of those judicial tribunals to which the constitution and laws of their country had confided

solely the distribution of justice. With the motives of those who thus acted, this court has nothing to do. With their *acts*, so far as they bear upon this case, it is its duty to deal. It is, therefore, constrained to attribute to those acts, and to the conduct of the respondent so far as it is connected with them, the character which the law annexes to them and to it. It is for the transportation and abduction of the libelant from his country to a foreign shore, with a view to carry out the proceedings of that unauthorized body, that he has appealed for the vindication of his rights to the laws of his country.

The first ground taken in defense to this appeal, is want of jurisdiction in this court.

Under this ground, the first proposition presented by the argument for the defense is, "that all these statements cannot be set forth as matters of aggravation nor be treated as surplusage, and the court be thus enabled to confine its action to that part of the case which has reference to the injuries committed on the high seas; or in other words, it is asked, what is the *gravamen* of this action?"

"How can it be said that the imprisonment at sea constitutes the gist of the action, and not the seizure and imprisonment on land? If it were possible to separate them, one would as clearly appear to be the ground of action as the other; and where it is impossible to separate them, for the reason that there is one continued trespass and false imprisonment, it is not quite as clear that the one is as much the *gravamen* of the action as the other."

Again, "Can the libelant maintain two separate actions, one for the injuries suffered on land, and the other for the injuries suffered on the high seas?" Lastly, to sustain this last point, and also that a single *tort* will maintain but one action, various common-law authorities from New York, and one

from Massachusetts, have been cited. The court disposes of this point and the authorities with the remark, that it admits the legal proposition they are cited to support, but does not, for the reasons it will give, consider the law enunciated by it applicable to this case.

The last ground taken to which we shall advert is, that the acts of defendant Smith constitute but one cause of action; and that part of such cause being exclusively of common-law jurisdiction, this court cannot act on any part of it as a court of admiralty. It will be perceived that the argument of defendant's proctor is in the form of interrogatories. A response to an argument thus propounded, must be replied to by stating the views entertained of this case by the court in one condensed answer.

1st. The court does not propose to treat the acts set forth in the libel as done by third parties on the land as surplusage, nor as part of the *tort* charged upon the respondent; but to consider and to retain them as matters of inducement, as facts going to aggravate the character of the offense committed by the present party, and as serving to show the *animus* with which he acted in the commission of the marine *tort* for which only he is sued.

It is difficult to perceive why the court cannot so consider them. To illustrate, suppose a libel filed against a master for maltreatment and cruelty towards a passenger, would not the previous condition of the passenger on shore, his protracted sufferings and illness, and the knowledge of all this by the master, and his advice to the patient to go with him to sea for the improvement of his health, be matters proper to be alleged and proved to qualify the character of the *tort* and the motives of the perpetrator? The respondent is called to answer for his own acts, not for those of third parties on the land prior to

the time at which *he* began to violate the rights of the libelant. It is urged that the cause of action in this case cannot be separated, because there is one continued trespass and false imprisonment. The court cannot perceive against the present respondent but one cause of action, the abduction of the libelant against his will, and the transfer of him to a foreign land. There are cases where the perpetrator of the *tort* is the author and architect of the whole, in which the *tort* is regarded as a unit, as a continued act. They have no application to this case. Thus, in *Plummer* v. *Webb* (4 Mason, 384), where the *tort* was the abduction by a master of a vessel of a minor, and damages were sought, Judge Story says, "Here, it is true, the tortious act, or cause of damage, might be properly deemed to arise in port; but it was a continuing act and cause of damage. . . . It was in no just sense a complete and perfected wrong, until the departure of the vessel from the port; and it traveled along with the parties as a continuing injury through the whole voyage."

In Rolle's Abridgment, 533, cited in the last case, it is said, "If a man take a thing upon the sea, and bring it to land, the suit for that may be in the admiralty court; for it is a continued act." Continued by whom? Certainly by the original *tort-feasor*.

In *Dean* v. *Angus* (Bee, 369), it is decided of a single *tort*, if such act be partly of common law, and partly of admiralty jurisdiction, the common-law courts are to be preferred. But no one of these cases, nor the common-law cases cited from New York, touches the case at bar.

Here, the respondent is sued for transportation of the libelant to a foreign shore against his consent. The act from its locality, is clearly within the jurisdiction of this court. It commenced on waters within the ebb and flow of the tide, and

was continued on the high seas. In *Waring* v. *Clarke* (5 Howard, 441), the Supreme Court decided that in cases where admiralty jurisdiction depends on *locality*, it extends to all *torts* committed on the high seas, or within the ebb and flow of the tide as far up a river as the tide ebbs and flows, although the place be *infra comitatus*.

In this case, the *tort* originated and was carried out by the respondent at a locality which brings it within the jurisdiction of admiralty as a marine *tort*.

The decision of the district judge on the exception to the jurisdiction of the court, must be affirmed.

2d. We now come to the question of damages.

In its adjustment, some embarrassment arises out of the difficulty which exists in keeping distinct from the great wrongs done to libelant by other parties, those committed on him by the present party.

Testimony was given in the District Court as to the character of libelant, without any objection. In the view the court entertains of this case, the consideration of the libelant's character should not influence to any extent the determination of the question of damages on the trial of this issue. In fact the district judge has repudiated the loss of character in his estimate of damages; for he states in his opinion, that the same "cannot be properly said to be the consequence of that portion of the *torts* committed upon him, of which a maritime court can take cognizance."

After a consideration of the testimony, the district judge says, "It is but just to say, that the charge that the reputation of the libelant was notoriously bad, that he was always engaged in election rows, and ballot-box stuffing, is not only unsustained by the evidence as to what his character was, but unsupported by any testimony as to particular facts which

might have justly given him that character." But suppose the reputation of libelant to have been good, it was not blasted by his abduction, or any alleged wrong done on the high seas, but by the action of third parties. It was the sentence of the Vigilance Committee which branded him with the mark of Cain. The mere fact of transportation by the respondent could not have wrought the moral ruin on the libelant, *he* therefore should not be made responsible for it. If on the contrary, the reputation of libelant was bad, and he was a bad man, an evil doer, such fact could not justify or legalize the action of his self-constituted judges. The law does not even regard malefactors in such a light. A distinguished writer has well said, "The law withdraws its protection from a malefactor while actually engaged in illegal acts; but at any other moment, it protects his person and property as impartially as those of others. If a burglar breaks into my house, or a pickpocket thrusts his hands into my pocket, I may on the instant knock him down. But, if I break into a notorious felon's house, and rob him, I am just as great a felon in the law's eye as if I so robbed an honest citizen; and so, if I attack a burglar's or a pickpocket's person and life at any moment when he is not feloniously engaged, I am none the less a villain in the law's clear eye because my villainy is aimed at a habitual villain. And here the law is not only just but expedient; for were such fatal partialities admitted, we would soon advance from doing acts of villainy upon villains to calling any one a villain and then wronging him."

With the motives of those, as before stated, who pronounced the sentence which was carried into execution by the respondent, this court has nothing to do; but it is its duty to apply to these acts in connection with the issue of damages in this case, the consequences which the law annexes to them.

In order to do so, it is necessary to ascertain whether the respondent knew what had been done to the libelant, and that he willingly lent himself to the execution of the so-called sentence. That he was aware of what he was doing; that he acted with his eyes open; that he knew an illegally condemned man was in his possession to be transported from his country, the evidence satisfies me, has been proved. The existence of the Vigilance Committee was open, public, notorious; the results of their action were at the time known to every man, woman, and child in San Francisco. If the respondent knew nothing of it, he was the only human being in the city who did not.

But the fact that the steamer Hercules lay to, with the libelant on board, in the harbor; that the respondent, master of the Yankee, went within one hundred and fifty yards of the steamer, made a tack, came right close up to her and threw the main-yard aback, and remained until a boat came to her from the Hercules with the prisoner on board; the presence of armed men in time of profound peace; the precipitation with which the delivery on board was made (one of the witnesses for the respondent—Abbott—stated that "there was not time enough to speak half a dozen words from the time they came on board until I left in the boat"); the instant filling away the sails and departure of the ship,—are all facts to prove that respondent's action was voluntary. But if there could be any doubt of the complete understanding by the respondent that he was carrying out the behests of the Vigilance Committee, it is removed by the fact that he received money for the act he was about to commit. Geo. R. Ward states he did not engage the passage himself, but he knows that the passage was paid. Another witness swears that respondent said, "that arrangements had been made for our passage." There can be little doubt that the act of the respondent was voluntary, in full

knowledge of the position in which the libelant stood at the time of his being brought on board, and that he also had a foreknowledge of what was to be done by him. What effect this will have on the subject of damages must be considered hereafter. In the assessment of damages a marked distinction exists between cases of contract and *tort*. In the former, the motive of the defendant is not inquired into in order to augment the remuneration to be made by him. In the latter, the absence of evil motive cannot be set up as an excuse so as to bar the action. I "had learned," said Lord Kenyon, "from Bacon's Maxims, that there is a distinction between answering *civiliter* and *criminaliter* for acts injurious to others: in the latter case, the maxim applied, *actus non facit reum, nisi mens sit rea;* but it is otherwise in civil actions where the intent is immaterial if the act be injurious to another." (*Haycraft* v. *Creasy*, 2 East, 104.)

If, therefore, the transportation were a mere trespass, unaccompanied by no evil motive, the absence of such motive would be no bar to the action. But where the law imputes a corrupt intention to the party, then the question of exemplary damages arises in addition to damages merely actual.

Sedgwick, in his Treatise on Damages, says, "The malicious intention may be said to increase, in fact, the injury; and the doctrine of exemplary damages might be reconciled with the strict notion of compensation." The author then proceeds to cite cases to prove that the idea of compensatory damages was abandoned, and that of punitive introduced. (Sedgwick, 456.) But a preliminary inquiry arises: does the law impute malice or a corrupt motive to the respondent in the *tort* he has committed? When the libelant stood before the respondent on the deck of an American ship, of which he, the respondent, was master, under the circumstances heretofore detailed, he (the respondent) must have known that to carry the libelant off,

against his consent, and land him on a foreign strand, was "a willful departure from a known duty." There can be no doubt of this; and, if so, it was proof of malice and an evil motive. In the case of *The United States* v. *Cutler* (1 Curtis, 502), speaking of the term "malice," as used in the act of 3d March, 1835, which punishes the offense of a master inflicting cruel and unusual punishment upon a seaman, the court say, that the word "malice" means "a willful departure from a known duty."

But again, if the respondent knew the act was unlawful, and did it intending to take the consequences, such wanton violation of law fixes upon him a malicious and corrupt motive. This principle is enunciated and was applied to the defendant in that case, who had resorted to a mode of punishment inhibited by law. If, in such a case, the violation of law is deemed *per se* proof of malice, *a fortiori* it should be annexed to the act of the present respondent, who availed himself of the protection of his country's flag, his character as an American citizen, and his position as a master of an American bottom, to violate in the person of an American citizen (however humble he may be), the constitution and laws of his country.

This "willful departure from a known duty," "this wanton violation of law," authorize the assessment of exemplary damages.

In *Huckle* v. *Money* (2 Wilson, 205), the action was for trespass, assault, and imprisonment; the act complained of being the arrest of the plaintiff under a general warrant. No actual ill treatment was alleged. A verdict for £300 damages was rendered; and a new trial was moved on the ground of excessive damages. Lord Justice Pratt made the following decision: "I know not what damages I should have given, if I had been upon the jury; but I directed and told them, that

they were not bound to any certain damages. The personal injury done to the plaintiff was very small, so that if the jury had been confined to consider the mere personal injury, why, perhaps, £20 would have been thought sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his life and station, did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them on the trial; they saw a magistrate over all the king's subjects exercising arbitrary power, violating *magna charta* by destroying the liberty of the subject by insisting upon the validity of this general warrant before them; they saw the king's counsel and the solicitor of the treasury endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages."

If under the British monarchy a willful violation of law in the person of a British subject, is regarded by the judiciary as a case for exemplary damages, this court cannot consider that a much grosser violation of law in the person of an American citizen should be deemed by the courts of this country as fully recompensed by an amount in dollars and cents which may cover the actual loss of time and expenses of the injured man.

In the case referred to, the amount of personal injury was small, an arrest of a few days, to be compensated for sufficiently by £20. The plaintiff acted under the color of legal process issued under the sanction of constituted authorities; and yet the gross violation of law was visited by exemplary damages to an amount nearly fifteen times the value of the actual damages.

There is another consideration which must receive the attention of this court, which controls its action in the exercise of its appellate jurisdiction. On this point, in the case of *McGuire*

& Place v. *The Golden Gate*, decided at the July Term, 1856, it was said "that ordinarily this court does not interfere with the amount of damages decreed by the court below. The district judge has the witnesses before him, and, therefore, has an opportunity of arriving at the truth, not within the grasp of this court, where the testimony is in writing. When, therefore, no additional testimony is taken, I do not feel inclined hastily to disturb a decree on the point of damages."

Certainly, in a case where it appeared that manifest injustice had been done in the assessment of damages, or error in law had been committed, it would be the duty of this court to interpose. I can see none such in this case. The libelant was carried off against his consent from home and country, and was by that act divested of his means of support, deprived of an office under the government which gave him a monthly income of $130, was held falsely imprisoned for upwards of a month. All these wrongs traveled with him and the *tort feasor* during the voyage, and were consummated by landing him some thousands of miles from home, amid strangers, in a foreign country, with his indorsement, that he was a man unfit to live in a civilized country,—an *hostis humani generis.*

And all this was done by respondent in violation "of a known duty," and in wanton contempt and violation of law.

I, therefore, cannot say that injustice has been done in the assessment of damages by the District Court.

A decree will be drafted affirming the decree of the District Court, and handed to the judge for signature.

Delos Lake, for appellants.

J. B. Manchester, for defendant.

DEN *v.* HILL and DEN.

Circuit Court, U. S., January Term, 1859.

The public acts of public officers, purporting to have been done in an official capacity, shall not be presumed to be usurped, but that a legitimate authority had been previously conferred, or subsequently ratified.

The reasons which gave application to this rule arose out of the powers of the Spanish monarch, and his relations with his vice-regents in the New World, and do not apply to the territorial or departmental governors of California.

Their granting powers must be exercised in conformity with the colonization decree of Mexico, of 1824, and the regulations of 1828.

No presumption in favor of the validity of their acts arises, to the extent to which that rule has been carried in the cases of Spanish titles.

This cause was left to be determined by the court, on the law and facts, without the intervention of a jury.

The latter are sufficiently set forth in the decision of the court, delivered by—

McAllister, J. This is an action brought for the recovery of damages for the detention and conversion of certain live stock, and other personal property. The damages are laid at $50,000. A jury has been waived, and the cause left by consent of parties, on the law and facts, to the court.

It appears that defendants, as the highest bidders at public outcry, became on the 4th December, 1845, the lessees for the term of nine years, of the mission of Santa Barbara, together with the live stock and personal property; which arrangement was made in conformity with the decree of the 25th May, 1845, and the regulations of 28th October, in the same year.

At the expiration of the lease, the plaintiff claimed to be the owner of the personal property, and demanded possession of a portion of it.

The defendants refused to recognize the ownership of plaintiff; whereupon he brought this suit.

To sustain his title, he produced a paper purporting to be made on the 10th June, 1846, by Pio Pico, constitutional governor, and which professes to convey the reversionary interest of Mexico to the Mission of Santa Barbara, after the expiration of the lease, with all its property, tenements, and stock, to the plaintiff. To prove the due execution of this document, the plaintiff relies on the admission of the genuineness of the signature of Pio Pico.

This is doubtless presumptive evidence of due execution at the time it bears date. It is but a presumption, however, and may therefore be rebutted by evidence.

Neither Pico nor Moreno the secretary whose signature is on the grant, was sworn as a witness, although the latter certifies officially on the grant, that an entry of it had been made in the proper book; and such official statement has been falsified by the fact that no such entry has been found in the proper book, or in any of the records or archives of the government.

This grant purports to have been made on the 10th June, 1846, a period near the time when the government of the territory had passed from his (Pico's) hands, and, indeed, during the very heat and conflict of the struggle in which his power was overthrown. Add to this, that this grant never saw the light, so far as the evidence ascertains, until 1848, after the return of Pio Pico to California, from his visit to Mexico; and it is much to be regretted, that the plaintiff has been content to rest solely on the genuineness of the signature of Pio Pico,

in a case the circumstances of which render the admonition of the highest judicial tribunal of our country peculiarly impressive, namely, that in such a case careful inquiry and scrutiny is necessary as to the authority of the governor, and the bona-fide exercise of it. (*The United States* v. *Cambuston*, 20 Howard, 64).

Now, in this case it is urged, that there are facts elicited by the testimony which disaffirm the presumption arising from the fact of the genuineness of the signature of Pico, and facts independently of the time and the condition of Pio Pico when he exercised the granting power, which show that the grant was made long after its apparent date.

These facts are, that the government archives contain no "*espediente*" note, or memorandum, of this grant, while there are record-notices of other grants of similar character issued about the same time.

That the certificate that an entry of the grant was made in the proper book, is false. That none such has been produced, and its non-production is not, satisfactorily accounted for.

That the sale of this property itself being public, was at a private sale.

That this grant was not only not archived, but its existence unknown to witnesses who, it was to be supposed, must have known of it had it been in existence.

That plaintiff in 1848 and 1850 disclaimed by his acts and declarations having any interest in the Mission of Santa Barbara.

L. T. Burton swears, he was assessor of Santa Barbara county in the latter year, and applied to the plaintiff for a list of his property; that he received a list of particulars from him; that no mention was made of any interest or claim in the Mission of Santa Barbara. That in that year the property was not

assessed, for the reason that he believed it to be government property.

In 1848, I. D. Stephenson was also in an official position, and "received orders to look into the tenures of the mission property, cattle, &c.; was instructed to send a secretary for the documents and titles. I received information that Dr. Den and Mr. Hill [the defendants] were the lessees of the mission in Santa Barbara. The only gentleman I knew of the name of Dr. Den, is the gentleman in court. He was riding by my quarters, I applied to him. He referred me to his brother, as having possession of the mission of Santa Barbara. I went immediately to the mission, saw Den and Hill, received the requisite information, and communicated it to my superior. Dr. Richard Den said he had no interest in the mission, and referred me to his brother."

An additional circumstance, which is ascertained by the *expediente* of Thomas H. Robbins, is invoked, which shows that a portion of the same lands alleged to have been granted to plaintiff, was granted some twenty days after that time, to the said Robbins, with full knowledge by Pico that they belonged to the mission of Santa Barbara.

Now, the foregoing circumstances afford intrinsic testimony which create no inconsiderable doubt as to the due execution of the grant, and lead to the conclusion that the grant was ante-dated, and was, in fact, ushered into existence at a much later period than the date it bears, and when any authority which had existed was at an end. This question, as to the valid execution of the deed, was a legitimate issue for a jury; and had this court anticipated this question would have arisen, it would not have assumed the responsibility of a jury in deciding it.

The court will not undertake to determine this question, as it proposes to place the disposition of this case on a ground independent of it. If the decision of the court shall be found to be correct, there is no necessity to decide whether the execution of the grant has been satisfactorily proved. If deemed to have committed error, the party aggrieved will have an opportunity of explaining the circumstances of this case.

The questions arise, 1st. At the time, and in the position in which Pio Pico was, and in the then condition of the country, did he possess the power to grant the reversionary interest of Mexico in the mission of Santa Barbara, and its live stock, and other personal property?

2d. Apart from the peculiarity of his position, did he, as governor, have the power to sell the personal property, cattle, &c., of a mission?

As to the first question. In the case of *The United States* v. *Palmer*, decided some months since in the District Court of the United States, sitting as a land court under the act of 3d March, 1851 (Brightley's Dig. 111), a grant made by Pio Pico, as governor (and Moreno, the secretary, in this case), came under consideration. In relation to that grant, the court had occasion to discuss the power of Governor Pico to grant anything at the time, and in the position he then held; and as the presiding officer of that court, I had occasion to say, "It must have been with a knowledge that hostilities between the United States and Mexico had commenced on the Rio Grande, that the American squadron was on the coast awaiting orders to take possession of this country, which they did immediately. It was at such a time, and in such a condition of affairs, that Pio Pico undertook to grant" &c. "The condition of things rendered the consummation of the contract impracticable, and

practical dominion had passed from Mexico." The court concluded by saying, "that it admitted of great doubt whether on that ground alone the grant should not be deemed invalid."

As in that case, however, although the grant was alleged to have been signed by Pio Pico and Moreno, the secretary, as in this, the court was satisfied it was ante-dated, and declined to decide on the ground of want of authority but predicated their decision on the ground that proof of the execution of the grant had not been made,—so in this case, though strongly impressed with the belief that all practical power to grant, in Pico, if it ever had been vested in him, had ceased to exist, the court will waive the further consideration of it, and proceed to the last view it entertains of this case, and the ground on which it will predicate its decision.

Had Pio Pico at any time, as governor, the power to sell or alien the personal property of missions, devoted by law to pious uses, without the intervention of any other department of the government?

In the case of *The United States* v. *Cambuston* (20 Howard, 64), the court say, that a grant issued under the circumstances which characterize the present, "should be inquired into and scrutinized with great care, as to the authority to make it." In the opinion of the court, it requires little scrutiny to ascertain that no authority existed here.

By the laws and regulations of Mexico, whatever may have been the occasional violations of them by unfaithful public agents, the governor had no authority to sell the personal property of the missions, because it belonged to the *neophytes*, the fruit of whose labor it was. These neophytes, with the fruits of their labor by those laws, were at first placed under the tutelage of the missionary priests; afterwards, under that of the administrators or *major domos*, appointed by the terri-

torial governors; and then, again, under the administration or curatorship of the missionary priests, to whom the property was restored by Governor Micheltorena, acting under the order of the supreme government. The manifesto of Figueroa gives a history of the laws,—Figueroa, the governor, who, in the estimate of this court (formed from its acquaintance with their transactions), stands pre-eminent among the departmental governors as a faithful and honest public servant. (Figueroa's Manifesto, pages 14, 17 to 22, 29, 30, 31, 32. Figueroa's Regulations; Rockwell; page 156, articles 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10. Also, clause 4, article 23. Alvarado's Regulations; Rockwell, 462, 466, art. 16. *Ibid*, 471, 475.)

Figueroa, in his manifesto, says (p. 31), "Then, and always, the neophytes of the missions were reputed owners of the property pertaining to them; because all was acquired by their personal labor in community under the direction of the missionary friars, who, as tutors, have administered and economized the property remaining, after maintaining, clothing, and supplying the necessaries of the subjected natives, as minors whose education had been committed to them by government."

The foregoing authorities ascertain that the authority exercised by the government over the missions as to their personal property, was as curators of the Indians or neophytes; and that any disposition of that property must be in subordination to their rights.

Don Pablo de la Guerra, a witness, says that the governor only exercised control of the property as curator for the Indians; and Alvarado, another witness, deposes that the property was held by the government for the benefit of the Indians and religious services of the missions.

Pio Pico, in his grant, has referred to the sources of his

authority. He first alludes to the full power with which he was vested by the supreme government to promote the general defense. He next refers specially to a decree of the honorable assembly of the 13th April immediately preceding the date of the grant (1846). He has not given, nor has any one else, the specific fountain from which his full powers flowed. The court, therefore, supposes that, for the source, it is to look to the general principle which has been enunciated: "that the public acts of public officers, purporting to be exercised in an official capacity, and by public authority, shall not be presumed to be usurped; but that a legitimate authority had been previously conferred, or subsequently ratified." This principle has been applied to Spanish titles, and was prominently enunciated in the cases of *The United States* v. *Arredondo* (6 Peters, 729); *The United States* v. *Clarke* (8 Peters, 436); and in *Delassus* v. *The United States* (9 Peters, 135).

The reasons which grew out of the powers of the Spanish monarch, and his vicegerents in the New World, which called for the application of the principle, do not exist in regard to the territorial or departmental governors of California; or the relations which subsisted between them and the government of Mexico. Their power to grant even vacant lands was restricted, and could be legally exercised only when in conformity with the provisions of the colonization decree of 1824, and the regulations of 1828 (20 Howard, 64). The power of a territorial governor to alienate the cattle and other fruits of the labor, belonging to the neophytes of missions, is not matter of presumption, particularly in a case like the present, where the circumstances under which it was exercised demand careful scrutiny into the existence of such authority.

We now turn to the second source of power to which Pio Pico refers in his grant (the decree of 13th April, 1846), in

conformity with which he states in the grant, he had resolved to make a genuine and effectual sale to Richard S. Den, of the Mission of Santa Barbara, with all its property, tenements, stock, and lands. Now, no such decree has been proved even to have been in existence. It is urged that the date of the 13th April was a mistake, and that the decree intended to be referred to, was that of 3d April, 1846, inserted under that date in Rockwell, 475. Suppose that such inference is correct, an inspection of that decree as set forth by Rockwell, shows no warrant for the action of Pio Pico. That decree on its face shows it could not have been the source of any power in relation to the Mission of Santa Barbara. By its first article, it is clear that this mission was not intended to be included. For the purpose of saving from ruin certain missions which could not find tenants who would lease them under the previous efforts made by the government, and were, therefore, falling into decay and ruin, it was decided that the departmental government should act in the manner which may appear best, &c. The Mission of Santa Barbara was, therefore, excluded; for it is ascertained from the testimony, it had been rented previously to the defendants, in conformity with the decree of 28th May, and the regulations of 28th October, 1845, and they were in possession of the mission at the time.

By the article 3, the decree provides, should government, by virtue of this authority, find that in order to prevent the total ruin which threatens said missions, it will be necessary to sell them to private persons, this shall be done at public auction, the customary notice being previously given. Article 4, provides that in case of sale, if after the debts be paid, any surplus should remain, this shall be divided among the Indians of the premises sold, government taking care to make the most just distribution possible.

This legislation exhibits the same spirit which always regulated the Mexican legislation toward the Indian convert. The titles to the lands where the missions were located, were never deemed out of the government; but that the government, in relation to the personal property of the Indians, acquired by their labor and production, acted towards it as curators and guardians, there can be little doubt.

When, then, Pio Pico referred to the decree of 13th April, 1846, if he intended to allude to the decree set forth by Rockwell, and stated he was acting in conformity with it, he simply stated that which is disproved.

The court considers it needless to refer in detail to the *Montesdioca* document, to the proceedings of the departmental assembly of 15th April, and 13th of May, 1846, or any other documents, to show that the grant was made without authority, but in contravention of the orders of the supreme government.

Judge Hoffman, in the District Court of the United States, sitting as a land court, under the act of 3d of March, 1851 (Brightley's Dig. 111), in the case of the "*Orchard of Santa Clara*," has referred in detail to some of the decrees and orders. His opinion has been published, and is easy of access. The conclusion to which the judge came was, "that admitting the governor's right to grant the vacant lands of the missions, or even to sell them, as to which latter I express no opinion, it is nevertheless clear that he had no authority either to grant or sell the vineyards, orchards, &c.; which on the petition of the bishop, had been recognized by the president as belonging to the Fathers, which had been restored to them by Micheltinevo, and the sale of which, under the assembly decree of May 28th, 1845, the supreme government had promptly interposed to prevent." This is the conclusion to which the court came, on

the general power of the governor to sell personal property of the missions.

In a case, where the sale was private and to private individuals; where the evidence of it professes to have been entered on the records, where no entry on record of the grant is produced, and its non-production not accounted for; where the existence of the grant for some time after its alleged execution was unknown; where the party had, by his act and speech, disaffirmed having any interest in the property; where a portion of the same land alleged to have been granted to the present plaintiff, was granted by the same grantor, with full knowledge that it composed a portion of the mission of Santa Barbara, within twenty days after the time the grant to the plaintiff is alleged to have been made; where the grant was made at a time, and under circumstances which require careful scrutiny, to ascertain the authority of the grantor and the "*bona fides*" of its exercise; and in view of the authorities hereinbefore referred to, as reported in Rockwell,—the court cannot consider the authority of Pio Pico to make the grant, under which plaintiff claims title, as having been established.

The court, therefore, acting as a jury, find a verdict in favor of the defendants.

James McDougal and *Isaac Hartman*, for plaintiffs.

Thompson, Irving & Pate, and *Eugene Lies*, for defendants.

PALMER *v.* ANDREWS.

Circuit Court, U. S., January Term, 1859.

THERE were three modes of taking a case out of the statute of limitations, prior to the passing of the act of 9 Geo. IV. c. 14 (Lord Tenterden's Act).

1. Acknowledgment by words only.
2. A promise by words only.
3. Part payment of principal or interest.

That statute substituted for acknowledgments and promises by words only, a writing embodying the same, and signed by the party to be charged, leaving part payment as it was before the act.

The statute of limitations of this State must receive a similar construction.

This action was brought on a promissory note; the statute of limitations was pleaded, and to this a part payment before the maturity of the note, was replied.

Held, that the replication was good.

A jury was waived in this case and the cause submitted on the pleadings to the court.

MCALLISTER, J.—The grounds of the defense as stated in the brief of defendant's counsel are, that the part payment set up by plaintiff is insufficient to take the case out of the statute of limitations, which has been pleaded; and secondly, that the note sued on is not a promissory note. To sustain the position that part payment in this State is insufficient to take the case out of the statute of limitations under the law of this State, reference is made to the case of *Fairbanks* v. *Dawson* (9 Cal. 89).

To support the proposition that the note sued on is not a promissory note, the case of *Garwood* v. *Simpson* (8 Cal. 101) is relied on.

The court will consider these objections in their inverse order.

1. As to the character of this document, the objection is, that although a fixed sum is mentioned, inasmuch as it is to be paid with "current rate of exchange," it ceases to be a promissory note.

It seems these words can have no meaning in this note, for it is difficult to perceive how the sum fixed can be rendered uncertain by them in a note executed and payable in the same place.

Upon the ground of authority, too, a note payable for a fixed sum with interest is held good as a note (Parson's Mer. Law, 87.) The court cannot therefore consider the note sued on in this case as void as a promissory note, for the reason assigned. In the case of *Garwood* v. *Simpson*, cited by defendant's counsel in support of his proposition, that the note sued on in this case is no note, the instrument, the subject matter of controversy in that case, was in the form of a bill of exchange. No certain or fixed sum was named; uncertain as it was, it was made payable out of a particular fund.

The second ground taken is attended with more difficulty; because it is sustained by a decision of the Supreme Court of this State. In the case of *Fairbanks* v. *Dawson* (9 Cal. 89), two of the judges (the third dissenting) decided that under the 31st section of the statute of limitations of this State, a part payment made before a contract has expired by limitation is insufficient to take the case out of the statute. The decision of the Supreme Court of this State is entitled to the greatest respect; but where the decision was by a divided court, and

the question involved, to a certain extent, a commercial one, this court does not feel constrained to subject its views of the law to the control of the authority absolutely, but will look into the reason of the case.

The learned judges admit, in alluding to the statute of 9 Geo. IV. c. 14 (Lord Tenterden's act), "that the difference in the language of the British and California statutes is very slight, while their substance and meaning are the same."

Although such is the fact, the court put a very different construction upon the California statute, from that which they were willing to concede to the British. This was not owing to any difference in the language of those portions of the two acts which related to "acknowledgments and promises," for it is admitted that the substance and meaning of both are the same; but the court placed their construction upon the import of the words in relation to acknowledgments and promises in the California statute, upon the omission of the legislature to insert in it the clause in the British statute, "that nothing therein contained shall alter or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever." The court in *Fairbanks* v. *Dawson*, say in relation to this clause, "It is clear that the legislature of this State intended to put part payment on the same footing with acknowledgments."

Upon the implied intention of the legislature inferred from their omission to introduce the declaratory clause as to part payment, which was in the British statute, the court put a different construction upon the words "acknowledgments and promises." Now, in relation to the construction of the language in the California statute, it seems its obvious meaning is so clear, it is unnecessary to resort to any implication.

The words are, "No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this statute, unless the same be contained in some writing signed by the party to be charged thereby."

This language is taken from the statutes of limitations which prevailed in other States. Similar words are used in the Massachusetts act. In *Williams* v. *Gridley* (9 Metcalf, 483) the court quotes them, and the words are, "No acknowledgment or promise shall be evidence of any new or continuing contract whereby to take any case out of the operation of the provisions of this chapter, or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing, signed by the party chargeable thereby." And they say, "It is quite obvious that this enactment has introduced a material change in the effect to be given to the statute of limitation of personal actions. It has prospectively legislated out of the judicial *forum* those numerous and somewhat perplexing cases of alleged new promises, either express or implied, sustained by *oral* admissions and statements by the party sought to be charged. Thus far, the statute is *plain as to the construction to be given to it.*"

About the construction, then, of that portion of the statute of Massachusetts which relates to acknowledgments and promises, and which is similar in language to our statute, the Supreme Court of Massachusetts had no doubt. The construction was, in its opinion, plain, and its sole object was to do away with acknowledgments and promises sustained only by *oral* admissions. The Massachusetts statute contained a clause similar to that in the British statute; but it never struck the court or the defendant's counsel, that the insertion of such a

clause varied the construction of the plain import of the language in relation to oral promises. All that the defendant's counsel suggested in relation to that clause was, first, that evidence of such payment can be only shown by some written acknowledgment; second, that oral admissions of the party were incompetent to prove part payment. The court did not suggest that the clause in question had anything to do with the provision as to oral admissions, but regarded the clause as leaving the part payment as it was before the passage of the act, and the fact of part payment having been made might be proved, like any other fact.

To the same effect is the case of *Sibley* v. *Lumbert* (30 Maine, 253).

An examination into the law as it existed at the time of the passing of our statute, and of the mischief the new act was passed to remedy, will aid in the proper construction of the act.

This examination has been made by the present chief justice of England in the case of *Cleave* v. *Jones* (6 Exch. 573), in commenting upon the statute 9 Geo. IV. c. 14 (Lord Tenterden's act), the language of which is "the same in substance and meaning" with that of the California statute. Anterior to the passing of that statute, according to the construction of the 21 Jac. I. c. 16, three modes were in practice to take a case out of the operation of that statute; first, an acknowledgment by *words* only; second, a promise by *words* only; third, part payment of principal or interest.

The two former modes were verbal acknowledgments and declarations. The statute requires them to be in writing, and to be signed by the party charged; but it leaves out, by not including, part payment. True, it does not, by express enactment, except part payment, as did the British statute; but the maxim *expressio unius est exclusio alterius*, applies. Where

the legislature have expressly spoken upon two of three modes of taking a case out of the statute, which were well known to commercial law, and are silent as to the third, the fair inference is, that they intended to leave it as it was.

Lord Campbell, in the case cited from the Exchequer, considers part payment an acknowledgment by *conduct*. Now, whether we consult the ordinary meaning of the words acknowledgment or promise, or their lexicographical meaning, they indicate not the conduct but the verbal acts of men. The words in our act are, acknowledgment *or* promise. The two words, therefore, indicate the intention to refer to the same character of transaction, founded alike on parol. It is reasonable to suppose that a totally different meaning was not intended to be annexed to the words thus copulated.

But to guard against all danger of such construction being put upon them, the British statute expressly inserted the clause as to part payment. The omission to take in the California statute the same precaution, is not a sufficient warrant for this court to extend, by judicial construction, the legislation of the State by implication to a different mode of taking a case out of the statute of limitations, upon the ground that, by omitting expressly to except it, their intention was to repeal it by the use of the words (acknowledgment and promise) which, as we have seen upon the highest judicial authority in England, from the time of 21 Jac. I., had always attached to them the meaning of being founded on *words* only.

In the view entertained by the court, judgment must be entered in favor of the plaintiff. Such an one will be drafted by the attorney for plaintiff, and submitted for approval and signature to the judge.

J. B. Townsend, for plaintiff.
Love & Watson, for defendants.

SPARKS AND KELSEY *v.* PICO.

Circuit Court, U. S., January Term, 1859.

THE fact that the note is barred by the statute of limitations, and no action at law can be maintained upon it, does not estop the holder of a mortgage from prosecuting his lien upon the mortgaged premises in a court of equity.

The statute of limitations bars the remedy on the note, but does not extinguish the debt.

The bill is filed in this case to foreclose a mortgage.

A *demurrer* is made to it, and the ground assigned is, that it appears by the bill that the mortgage sought to be foreclosed was given to secure the payment of a promissory note made and executed by defendant more than four years before the filing of the bill, and because it does not appear from said bill, that defendant within said four years promised in writing to pay the said debt or any part thereof.

MCALLISTER, J.—The question arising out of these pleadings is, whether the fact that the promissory note cannot be sued on (by reason of being barred by the statute of limitations), estops complainant from enforcing in a court of equity his lien on the mortgaged property.

In the case of *Fairbanks* v. *Dawson* (9 Cal. 89), the Supreme Court of this State have said, speaking of the English statute of limitations and that of this State, that there may

be a little difference in their language, but "their substance and meaning are the same." In the English statute the language is "no action shall be maintained, &c." That of the California statute is, "no action shall be commenced," &c. Both statutes alike bar the remedy, neither renders void or extinguishes the debt, or cause of action.

Two early cases in England, that of *Draper* v. *Glassop* (1 Lord Raymond, 153), and an *Anon.* case in Salkeld, 278, decided that the statute of limitations destroyed the *debt*, as well as the *remedy;* but *Parsons*, in a note to his treatise on Contracts, says of those two cases, "These decisions have now no authority;" and he refers to several more recent authorities, beginning with *Lord Mansfield.* He further says in his treatise on Mercantile Law. (250.) "It is important to remember that the statute of limitations does not avoid or cancel the debt; but only provides that no action shall be maintained upon it, after a given time." "But it does not follow, that no right can be sustained by the debt, although the debt cannot be sued. Thus, if one who holds a common note of hand on which there is a mortgage or pledge of real or personal property, without valid excuse neglects to sue the note for more than six years, he can never bring an action upon it; but his pledge or mortgage is as valid and effectual as it was before, and as far as it goes, his debt is secure; and for the purpose of realizing this security, by foreclosing a mortgage for instance, he may use whatever process is necessary on the note itself."

With a single exception, I can find no case, unless decided under a statute, which sustains the proposition that the deprivation of a right to sue on a promissory note to recover its contents, annuls the right of the holder of that note, if he also holds a mortgage in which the title to real estate was conveyed to him as security, to enforce his lien on that property in a

court of equity. The solitary case to which allusion has been made as the only one which is direct upon the point which has come to the notice of this court and sustains an adverse doctrine, is that of *Duty* v. *Graham* (12 Texas, 427).

The policy of the State of Texas, which seems to control the judiciary of that State, is apparent by reference to the case of *The Union Bank of Louisiana* v. *Stafford* (12 Howard, 340). In this last case the Supreme Court say, "However much it may be the policy of Texas (as it is alleged in the case of *Love* v. *Dock*, and *Snodley* v. *Cage*, lately decided in the Supreme Court of that State) to give a liberal construction to their statute of limitations, in favor of debtors, for the purpose of encouraging immigration, it is abundantly apparent that these sections (of the limitation law) can have no application to a bill in equity to enforce the sale of mortgaged property, whether the slaves in question be considered either as personalty or realty."

The principle enunciated in that case (12 Howard, 328) is, that the Texas statute of limitations of actions upon contracts, or for the detention of personal property, have no application to a bill in equity, to foreclose a mortgage. Equity does not allow the mortgagor to set up his possession as adverse to the mortgagee.

"In cases [say the court] of concurrent jurisdiction, courts of equity are said to act in obedience to the statute of limitations, and in other cases to act upon the analogy of the limitations of law. A bill to foreclose a mortgage and enforce the sale of mortgaged property, has no analogy to an action of *trover*, *detinue*, or trespass. The claim of the mortgage is a "*jus ad rem*, not a *jus in re*." He does not claim as owner of the property. The possession of the mortgagor is not adverse but under the mortgagee."

Hughes v. *Edwards* (9 Wheaton, 489), was a case on the equity side of the court, in which a decree of foreclosure of mortgage was rendered. That the legal cause of action in that case had been barred by the statute of limitations, is inferable from the observations of Washington, J., who delivered the opinion of the court. He says, "But the use he (the appellant's counsel) endeavors to make of the objection, was to turn the complainants out of a court of equity, and leave them to their legal remedy by ejectment to recover the possession of the granted premises, in which, it was supposed, they might be successfully encountered by the statute of limitations." (*Ibid.* 494.) And it is proper to observe, that in the case at bar, the complainants, if left to their remedy at law, would be utterly remediless; for, by a statute of this State, no action of ejectment can be brought for the recovery of premises conveyed by mortgage. But the Supreme Court of the United States in above case did not turn the complainants out of court, and in relation to the question of time say,

"Whether the defendant could avail himself (in the former case in the action at law) of the act of limitations, whilst the equitable remedy of the plaintiff is subsisting, is a question which need not be decided in the present case, as the parties are now before a court of equity. The effect which length of time may have upon the plaintiff's rights in *that* court, will be considered under another head." (*Ibid.* 494.)

It is manifest, then, from the two decisions of the Supreme Court to which reference has been made, that the statute of limitations of this State does not apply to this case, and that considerations in regard to the extent to which the rights of complainants are affected by the efflux of time are to be considered by those rules which control a court of chancery, apart from any estoppel supposed to arise out of the fact that a com-

mon-law remedy by action on the note has been barred by the statute of limitations.

And here this case might be left; but the principle asserted by the *demurrer* in this case—that a mortgagee is remediless on his mortgage, because his remedy on the note it was given to secure had been barred by the statute of limitations—is of so great practical importance, that a more minute consideration of the authorities is not inappropriate.

In the case of *Elkins* v. *Edwards* (8 Geo., 325), it is expressly decided, that where a mortgage is given to secure a note, and the remedy on the latter is barred by the statute of limitations, and the debt is unpaid, the creditor may avail of his lien, and foreclose his mortgage. And the court gives as the reason for his ability to do so, that he (the creditor) stipulated by contract for two remedies against his debtor to enforce the collection of his demands. These two remedies are totally distinct: the one by an action at law on the note, one of the written evidences of his debt; the other, by a bill in equity to procure a sale of the mortgaged property.

In *Eastman* v. *Foster* (8 Metc. 19), it is decided, that a mortgage to indemnify the mortgagee for his liability as surety upon a note of the mortgagor, creates a trust and equitable lien for the holder of the note, subject to which the mortgagee holds the land, though the note be barred by the statute of limitations, &c.

The same principle is affirmed in *Crain* v. *Paine* (4 Cushing, 483). The court say, "It was argued by defendant's counsel, that the note has been barred by the statute of limitations; but this clearly cannot defeat the plaintiff's title to the mortgage property, so as to bar the present action."

In *Joy* v. *Adams* (26 Maine, 330) it is said, "A mortgage security has not been deemed to be within any branch of the

statute of limitations. He (the mortgagor) who would avoid such security, must show payment." He has not been allowed to defeat the right of the mortgagee, by showing that the personal security, to which the mortgage security is collateral, has become barred by the statute of limitations.

A similar doctrine is affirmed in the case of *Thayer* v. *Mann* (19 Pick. 535). The foregoing are the views of the text-writer, Parsons, in his Treatises on Contracts and Mercantile Law, the several English decisions referred to in his note, five American State decisions, and two cases from the Supreme Court of the United States. Opposed to this mass of authority, is the solitary case of *Duty* v. *Graham* (12 Texas, 427). After settling, satisfactorily to itself, that a mortgage is mere security for a debt; that the mortgagor remains the owner of the land, entitled to the possession of it, and the mortgagee cannot maintain trespass to try title to it,—the inference is drawn by the court, contrary to all the foregoing authorities, that where the note, secured by a mortgage, is barred by the statute of limitations, the effect of the statute is not only to prevent a recovery on the note, but destroys the original debt, and all additional evidences in the possession of the creditor; and this all the result of implication.

Let us look to the reason of this, so far as this case is concerned. When the creditor advanced his money, he entered into two contracts. By one, he took the personal pledge of the borrower. Not content with this, he required and the borrower agreed, the one to receive and the other to deliver, a solemn, written instrument, under seal, in which the borrower acknowledges the execution and delivery of his written promissory note, and at that time that he is justly indebted to the complainant in the sum of two thousand dollars. The condition annexed to this document is, that if defendant shall *pay*, or

shall cause to be *paid*, the sum of two thousand dollars, with all interest due, according to the tenor of a promissory note, specially referred to, the mortgage should be void; otherwise to remain in full force and effect. No portion of the two thousand dollars has been paid, and the mortgage is still in force by its very terms.

In *Thayer* v. *Mann* (19 Pick. 535, 537), the court say, "A reference to the condition contained in the mortgage shows, that it is to be and remain in full force, until the debt shall be paid.

"The debt remains, although the statute may discharge the remedy on the note." (2 Hilliard on Mortgages, 25.) The debt is the money due. If the only evidence of its existence is a promissory note, and that is barred by the statute of limitations, the plaintiff is remediless. But if he has secured a lien on property as security, and additional evidence of the debt, he has the right to make it available by a resort to equity. If, pursuing that course, the absence of the note unaccounted for, or other circumstances, raise the presumption of payment of the debt, he must neccssarily fail. In this case, the non-payment of any part of the debt is an admitted fact. Whenever the complainant shall attempt to invoke a remedy of which he is deprived by the statute of limitations, he will be encountered by that act; and the question will then arise, in the language of the court in the case of *Hughes* v. *Edwards* (9 Wheaton, 494), "Whether the defendant could avail himself of the act of limitations, whilst the equitable remedy of the plaintiff is subsisting?" This question need not be decided in this case, as the parties are now before a court of equity.

But there is a fatal defect in the form of the *demurrer* in this case, which avoids it, independently of all other objections. The ground assigned for the demurrer is, that it appears from the bill that the promissory note to secure which the mortgage

was given, was made and executed by the defendant, more than four years before the filing of the bill.

The statute of limitations does not run from the date of the note, but from the time the cause of action accrued.

But, as an argument was had on all the questions involved, and the court would have permitted an amendment of the demurrer, a decision upon the whole case has been made.

An order, overruling the demurrer, must be entered.

J. B. Hart, for complainant.

Gregory Yale and *A. C. Campbell*, for defendant.

WEST *v.* STEAMER "UNCLE SAM."

Circuit Court, U. S., January Term, 1859.

WHERE a party creates a duty or charge against himself by express contract, he is bound to make it good, notwithstanding any accident through necessity, as he may have provided against such in the contract.

The pleadings in a court of admiralty are more simple and less technical than in a court of common law.

There are no technical variances or departures in pleadings in admiralty.

This is an appeal from the action of the District Court of the United States for the Northern District of the State of California, where a decree was rendered in favor of the libelant for the sum of $800.

MCALLISTER, J.—The libel was exhibited to recover damages for the breach of a passenger contract which had been entered into for the transportation of the libelant and his wife from San Francisco to New York *via* the Nicaragua route; and the alleged breach consisted in not carrying them to Nicaragua; but transporting them against their consent to the Isthmus of Panama, and leaving them there to shift for themselves, and without the immediate means of escape therefrom.

It appears that after leaving San Francisco with the libelant and his wife, and other passengers, on board, about five days out, the "Uncle Sam" was boarded by an agent from the owners, and after communication with him, the master of

the "Uncle Sam" announced to the passengers that the destination of the vessel was changed from Nicaragua to Panama. The fact also appeared, that the steamer which was to have connected with the "Uncle Sam" at "San Juan del Norte," and have taken her passengers to New York, had been withdrawn by the agents of her owners; and consequently libelants would have been unable, even if they had reached that place, to get away from it.

The defense set up for the breach of contract is, that the Costa-Rica army was in possession of the Nicaragua route, and that any attempt by the passengers to cross would be hazardous.

In the case of *Hand* v. *Baynes* (4 Wharton, 204), defendant received for carriage certain goods from Philadelphia to Baltimore *via* Chesapeake and Delaware Canal. On arriving at the mouth of the canal, the master was informed the locks were out of order, and that he could not be allowed to pass through the canal. He then went down to sea, and proceeded to sea, intending to go outside to Baltimore, but in a gale of wind struck on a shoal, and the ship, with the cargo, was totally lost.

The following remarks are made by the Supreme Court of Pennsylvania, in that case:—

"There is no mistaking the intention of the parties;" "the route through the canal is part of the contract." (There was no mistake about the intention of the parties in this case, the route was to New York *via* Nicaragua.) But it is said, said the court, "that although the contract was to carry the goods by way of the Chesapeake and Delaware Canal, yet that the deviation from the prescribed route arose from necessity. When the master discovered the impediments to the prosecution of the voyage, through the route called for in the

contract, his duty was plain; he had one of two courses to pursue,—to remain in a place of safety until the obstructions were removed; or he should have returned and informed the shippers and owners, of the impracticability of proceeding through the canal. But suppose the contract to be express, to deliver the goods in a prescribed time (or, as it may be said in this case, by a prescribed route), would any temporary obstruction, or the impossibility of complying with the engagement, arising from the condition of the locks or any other cause, be a defense to a suit for a failure to perform the contract?

"When the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by the contract. This is founded in reason and authority."

The principles enunciated in foregoing case of *Hand* v. *Baynes*, are applicable to the one at bar.

But, there are other facts worthy of consideration. The existence of hostilities in Nicaragua had been known in San Francisco for some time, and the seizure by "Walker" of the property of the company was known at San Francisco at the time the agents of the company dispatched the "Uncle Sam," entered into the contract, and pocketed the money of the libelant. When, a few days subsequently, the master of the "Uncle Sam" learned that the steamer that should have connected with the "Uncle Sam" at San Juan del Norte, had been withdrawn, and rendered impracticable the fulfillment of the contract, his duty was to have instantly retraced his course, and brought his passengers back to San Francisco. This he did not do, but consulting the wishes or what he conceived to be the interest of his owner, and treating his passengers as so

much live cattle, he carried them to "Panama" and left them on the Isthmus to shift for themselves.

Had they been a drove of cattle, or a mass of merchandise, he should have had them forwarded at the expense of the owners to New York.

At Aspinwall, the libelant and his wife, there being no steamer for New York, and no means of escape, were forced to remain seventeen days. A forced residence in a place whose pestilential horrors inflame the imagination of the most phlegmatic, whose unhealthiness is almost a by-word, and where illness almost unto death visited the libelant, and sickness fell upon his wife,—if not the result, certainly aggravated by the position in which they were placed by the breach of the contract by the master,—are facts, which entitle the libelant to compensation. The amount of it was fixed by the District Court at $800.

This court has repeatedly decided that, as an appellate tribunal, it does not interfere with the decree of the court below on the ground of the amount of damages, unless such decree has been given as to show manifest injustice. It can perceive none such in this case.

But it is objected that no special damages are alleged in the libel, and that there is nothing but a general allegation, which is insufficient; that such allegation would not be sustained at common law; and that the pleadings in an admiralty court and in a common-law court, are the same.

The libel alleges that the libelant and his wife were at Panama taken out of the "Uncle Sam" against their will; carried to Aspinwall, and then set down, without food, or sustenance, or accommodation of any kind; where, there being no means of leaving, no vessel to carry them away, they were detained seventeen days, at great expense; and from want of

accommodation, and the well-known sickly character of the climate, were put to great expense from sickness; and that libelant has sustained, as he believes, damages thereby to the amount of two thousand dollars. Under this general allegation, the libelant gave evidence of the facts to show detention, illness, &c.

That the allegation is inartificial, and not technically drawn, may be admitted. To ascertain its sufficiency, we must look to the character of the breach charged. It involved personal wrongs, constituting both mental and physical sufferings, which may be experienced and felt, but cannot be decimated into dollars and cents. One may, as the libelant did in this case, suffer from illness aggravated by the total want of accommodation and comforts, and the sickliness of the wretched place in which he was placed, and where he was forced to remain by the acts of another,—and the amount of damage can only be inferred from his detention and his situation; which facts are set forth in the libel.

In the case of *Wade* v. *Leroy* (20 Howard, 34), a common-law case, the allegation was general, and there was no special damage alleged. Objection was made to the proof of special facts, on the ground that the declaration contained no allegation of special damages; but evidence was admitted under the general allegation. The court say, "This evidence would certainly assist a jury to determine that the plaintiff had sustained an injury of no slight character,—an injury to his person; and which was followed by expense, suffering, and loss of time, which had for him a pecuniary value. These were the direct and necessary consequences of the injury, and sustained strictly and almost exclusively as an effect from it."

That was a common-law case; and the allegation of dam-

ages was general, and mental and bodily suffering deemed sufficient for the court to act upon.

In *Coppin* v. *Braithwaite* (8 Jurist, 875), cited in Angel on Carriers, edition of 1851, p. 508, note, "A declaration in *assumpsit*, to carry the plaintiff in a ship to a certain place alleged, as a breach, that the defendants by their agents, caused him to disembark at an intermediate point; and the disembarkation to be conducted in a scandalous, disgraceful, and improper manner, whereby, and also by contemptuous usage and insulting language addressed to the plaintiff by the said agent, in effecting said disembarkation, the plaintiff sustained damage.

Held, 1. The declaration was good, on motion in arrest of judgment.

2. That the judge had rightly received evidence of the language of the captain of the defendant's ship, in putting the plaintiff ashore.

3. That the judge had rightly directed the jury, that the defendants were responsible for any injury *naturally* resulting from the acts of the captain, when acting as their servant; and that the plaintiff was entitled to a fair compensation for the injury done to him in being put on shore at the intermediate place, so far as injury arose from the act of the captain in putting him on shore.

In neither of foregoing cases was the want of an allegation of special damages held to be fatal to the declaration. Both were common-law cases, where the more rigid and strict rules of that system of pleading obtain. In a court of admiralty, the question as to the sufficiency of pleadings stands on a different footing from what it does in a court of common-law. It has been earnestly urged, that the pleadings in courts of common-law and admiralty are the same, and the strictness which con-

trols the one regulates the other. This would be strange, if true, considering the different sources from which the common law and the admiralty have arisen, and the different systems under which they have been fostered. It would be, in fact, to say there was no difference between the precise, minute, and logical mind of a special pleader of Westminster, and the expansive and capacious intellect of a Sir William Scott, or some other great advocate of admiralty practice and law.

In the case of *Dupont de Nemours & Co.* v. *Vance et al.* (19 Howard, 162), a libel was filed against the consignee of a vessel, to recover the contributory share of the salvage due from the goods which the master had voluntarily delivered to the consignee before the libel was filed; and the question arose whether the court could admit a claim for general average, in an action founded on a cause of affreightment? In that case it is clear that the promise implied by law in one case, is different from the promise to pay on the face of the bill. The causes of action were different. In a court of law it would have been difficult to have given judgment for a cause of action different from that alleged in the declaration; but in that case the court, considering the differences between the causes of action as technical, rendered a decree in favor of the libelants. Now, they rested their power to do so on the difference which existed between pleadings in courts of common law and admiralty; and in the fact, that there existed in the latter no technical rules of variance or departure.

After stating that the libelant may pray (*Ibid.* 171) generally or specially for the relief he asks, the court say, "Pleadings in admiralty are exceedingly simple, and free from technical requirements. . . . The proofs of each party must correspond substantially with his allegations, so as to prevent surprise. But there are no technical rules of variance or de-

parture in pleading, like those of common law; nor is the court precluded from granting the relief appropriate to the case appearing on the record, and prayed for in the libel, because that entire case is not distinctly stated in the libel."

This court cannot, therefore, consider that the general allegation in the libel in this case is to be deemed insufficient, which in such a case would be good, even in a declaration at common law.

In a libel for the breach of a passenger-contract, consisting of personal wrongs, by way of detention, loss of time, and subjection to exposure and risk in a place designated as fraught with danger to human life, I cannot consider that special damages must be laid in analogy to a common-law declaration; but that proof under such general allegation may be given of the detention, loss of time, and any other facts to show the exposure and suffering of libelant and his wife.

A decree will be drafted affirming the decree of the court below, and handed to the judge for signature.

Thomas C. Hambly and H. J. Wells, for libelant.

Delos Lake and James T. Boyd, for respondent.

GORDON *v.* THE SOUTH FORK CANAL COMPANY *et al.*

Circuit Court, U. S., January Term, 1859.

THE legislatures of the States may pass laws which go to the remedy on past as well as on future contracts, provided they do not impair their obligation.

An alteration by law of a remedy to such extent as to materially affect a right vested under a prior contract, is unconstitutional.

A bill was exhibited in this case to enforce a statutory lien and for other objects.

The defendant filed a plea setting forth the invalidity of the lien sought to be enforced.

The decision on the plea was delivered by—

MCALLISTER, J.—To the bill exhibited in this case a *demurrer* was filed; and it was sustained by the court for want of proper averments to give jurisdiction, with liberty to amend. The complainant has done so; and one of the defendants, D. K. Newell, has filed a plea which raises an issue as to the validity of the lien to enforce which is one of the objects of the bill.

The first and preliminary objection to the argument of this plea is, that the issue now raised was disposed of by the decision on the *demurrer*. The court does not so consider, as its action on it was limited to the question of jurisdiction. Again, the allegation in the bill was general; it was, that notice of the lien was recorded according to law. This general averment on the argument of the *demurrer* was taken as true. The plea now filed sets forth the notice, and

specifies wherein the alleged invalidity exists. The court cannot consider the decision on the *demurrer* as precluding the defendant from setting up this defense in form of a plea.

The grounds on which it rests are,—

1st. That by the act of 12th April, 1850 (Comp. Laws, 808), no lien was given except upon buildings and wharves; and this was the only law in force at the date of the contract with Gordon & Kenyon.

The bill in this case seeks to enforce a lien upon a *canal.*

2d. That the act of 17th May, 1853 (Comp. Laws, 811), was passed subsequent to the date of the contract, and after most of the work done by the complainant had been performed. This act was prospective, and could not retro-act so as to confer a lien where none existed at the date of the contract.

By these objections, it is apparent that the date of the contract is made the point of time which is to limit the operation of the act, and beyond which it could create no right. The conclusion drawn in the brief of defendants' counsel is, that "the legislature had no power to incorporate a new element into the contract, and create a lien on a canal where none existed at the date of the contract." With a view to sustain the theory that the lien affects the contract, it is urged, that the labor performed and materials furnished could only have been done and furnished under a contract. This is true; for no cause of action can arise *ex contractu* that is not founded on contract; but that may be verbal, in writing, or implied.

The case of *Houghton* v. *Blake* (5 Cal. 240), cited by defendants, simply affirms the principle that the materials furnished must have been so by the express terms of the con-

tract. A reference to the case of *Bottomly* v. *Grace Church* adopted and relied on in the former case, will show that all that was decided is, that the statute never contemplated that a person should have the right of following the materials which he had sold in general terms, and obtain a lien upon any building to which the materials had been applied. The materials must have been furnished to the particular building on which the lien was to be enforced by the terms of the contract in pursuance of which it was constructed.

With a view to ascertain whether the lien under the law which creates it operates upon the contract in this case, it is necessary to examine the legislation of this State in relation to the liens of mechanics and other operatives.

The act of the legislature of 12th April, 1850 (Comp. Laws. 808), created a lien on buildings and wharves in favor of two classes of laborers.

1st. The first were master builders, mechanics, and all other persons furnishing labor or materials by contract with the owner himself. By the 7th section of this act, this class, to secure their lien must file in the recorder's office of the county in which the building or wharf is situated, before the expiration of sixty days from the completion of the work or repairs, notice of his intention to hold a lien upon the property declared by the act liable to the lien, specifically setting forth the amount claimed. It is also provided, that suit shall be brought to enforce the same within one year after the work is done or materials furnished, or within one year after the expiration of any credit which may have been given; but no lien shall continue for a longer term than two years from the time the work is completed, or the materials furnished, by any agreement to give credit.

The second class of persons in favor of whom a lien is created, are contractors, journeymen, &c., performing labor or furnishing by contract with the masters or contractors, and between whom and the owner there is no privity of contract. This second class of persons, in order to fix their lien are to pursue the course prescribed by the second, third, and fourth sections of the act. By these, they are required, first to look to their employer, next to the owner, which latter is only liable in cases where notices have been served upon him in conformity with the statute. No period of notice to the owner by this second class is prescribed; and the construction which has been placed by the Supreme Court of this State upon this portion of the statute is, that it intended to provide for the first class an actual lien existing *from the commencement of the work* (in this construction this court coincides) until sixty days after its completion, leaving the second class their remedy by notice to the owner; and no time being fixed when such notice shall be given, that their lien attaches only upon the service thereof—that this mode of proceeding was intended to prevent litigation by substituting a proceeding in the nature of an attachment; and they put this class of cases on the same footing as ordinary attachments, in which the rule "*qui prior est in tempore potior est in jure*" obtains. (*Cahoon* v. *Levy*, 6 Cal. 295.)

The next act of the legislature of this State upon the subject of a mechanics' lien, is that of 17th May, 1853 (Comp. Laws, 811). It extends the lien for all labor done and materials furnished, to "bridges, flumes, or aqueducts constructed to create hydraulic power or for mining purposes; and gives such to all persons performing labor or furnishing materials for, or employment in, the construction of any such bridge, &c., subjecting it to the provisions and regulations as in and by said

act of 12th April, 1850 (Comp Laws, 811), are provided for buildings and wharves.

It is a rule in the interpretation of statutes, that all in "*pari materia*," must be construed together. *A fortiori*, such, should be the rule where, as in this case, the "provisions and *regulations* of the previous law are expressly incorporated into the more recent statute.

The effect in such case is, to make all the provisions of the old law part and parcel of the new, which are not repugnant, and which form portions of the provisions and regulations which regulate the lien.

The complainant rests his claim to a lien under the act of 17th May, 1853, for until the passing of that act no lien on a canal existed; but to sustain his claim he must show he complied with that law, and if he does so, he can be required to do no more.

It is true that the legislature of this State on the 27th April, 1855 (Pam. Laws, 1855, p. 156), passed an act repealing the law of 12th April, 1850; but at the same time it expressly enacts, that "nothing herein contained in this act shall be deemed to apply to or affect any lien heretofore acquired," &c.

By this latter act it is required that the notice of lien to be given shall contain a *correct* description of the property on which the lien is intended to be enforced.

The act of 12th April, 1850, required a description of the property without using the word "correct." But this omission in the older act can give rise to no different construction in the interpretation of the two statutes.

When the previous act prescribed a description of the property it is to be deemed that a correct one was as much required by its language as when the legislature in the subsequent law used the word, correct. It is only important to construe the

language used in both acts with a view to enable us to arrive at the true intention of the law. To this comparison we will come hereafter when the objection made to the description of property given in this case in the notice of lien is to be considered.

Both acts, that of 12th April, 1850, and that of 17th May, 1853, annex the liens created by them to no contract; but to labor done and materials furnished. Whatever the nature of the contract, the character of the lien is not affected. The law does not alter or impair the obligation of any contract, the lien is founded upon the labor and materials. Going upon the idea, that "the laborer is worthy of his hire," the legislature make the result of his work the sole meritorious ground of the lien.

If the act operated upon the contract made prior to the passing of it, and divested a vested right, it would be obnoxious to the objection made to it on the ground that it is unconstitutional.

To sustain that proposition, the case of *The People* v. *The City of San Francisco* (4 Cal. 127), has been cited.

That case was decided on two grounds. 1st. That by the terms of the act under consideration the act was not to take effect until July following, and consequently was by its saving clause to take effect *in futuro*.

2d. That previous to the passing of the act, the right had vested in the party, as purchaser from the sheriff, to receive an absolute deed for the property of which he had been divested by the subsequent law giving the right of redemption.

The principle decided in the latter proposition is embodied in the case of *McCracken* v. *Hayward* (2 Howard, 608).

The act under consideration does not attach to the contract, it goes exclusively to the remedy. It may indirectly affect

the contract; but it does not impair it, nor does it divest a vested interest under it. Most legislation as to the remedy, more or less affects the contract; though it may not to such extent as to invalidate the law.

In *McCracken* v. *Hayward*, above cited, the Supreme Court of the United States say, "It is, however, not to be understood that, by that or any former decision of this court, all State legislation on existing contracts is repugnant to the constitution."

As legitimate instances of the exercise of this power, they allude to the right of the legislatures of the States to pass recording acts, by which the elder grant shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts. The power to limit a remedy by barring the right of action, being remedial legislation, although it affects the contract, is constitutional. (*Ibid.*)

In *Bronson* v. *Kinzie* (1 Howard, 315), the same court say, "Undoubtedly a State may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may shorten the period of time within which claims shall be barred by the statute of limitations."

Now, each of foregoing instances in which it is admitted the State legislatures have a right to legislate, affect the contract to as great extent as does the act under consideration, which gives to a party to a contract an additional remedy,—a lien upon his work.

In the case of *Bronson* v. *Kinzie* (1 Howard, 316), the court further say, "And although a new remedy may be deemed less convenient than the old one, and may, in some

degree, render the recovery of debts more tardy and difficult, yet it will not follow that the law will be unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the State, *provided* the alteration does not impair the obligation of the contract."

It is difficult to perceive, how an act which gives an additional remedy to the holder of a contract can be said to impair its obligation.

Of what vested right does it deprive the party? The obligation imposed upon him by its terms, was to pay for the work. It vested in him no right not to pay. Can the law which from motives of policy gives an additional remedy and security, be said to divest a right from him which he never possessed? The true distinction is, that what belongs to the *remedy*, if it does not impair the obligation of the contract, is within the legitimate limits of State legislation.

The court cannot consider the law under consideration as unconstitutional, or having divested a vested right.

Whether the law should be deemed to create a lien on any labor or materials done and furnished subsequent to the passage of it, is a question not now to be determined. That it does create a lien on all labor and materials done and furnished prior to the passing of it, there can be little doubt; and the plea admits that some portion of the labor and materials are in that category. Whatever be that portion is matter of proof on the trial of the case.

Another objection to the validity of the lien is, that the notice of lien filed by complainant was insufficient, on two grounds—

1. The description of the property in the notice of lien is inaccurate.

2. That if the complainant ever had a valid lien, he has

lost it by a failure to bring suit in time. The act of 12th April, 1850, requires that the suit should be brought within one year after the work was done, which was not done in this case.

As to the description of the property, we have seen that the act of 12th April, 1850, requires that notice of the intention to hold a lien on the property declared by that act shall be recorded, specifically stating the amount claimed. The act of 27th April, 1855, requires a correct description of the property to be given. No form is prescribed. Under the latter law the case of *Montrose* v. *Conner* (8 Cal. 344), cited by defendant's counsel, was decided. The description of the property in the notice of lien in that case was in these words, "As a dwelling house lately erected by me for J. W. Connor, situated on Bryant street, between Second and Third streets, in the city of San Francisco, on lot—"

In relation to such description the court say, "There are a number of lots on Bryant street between Second and Third streets, to any one of which it would apply as well as to the one in question." That description of an individual object which was so inaccurate as to apply equally well to a number of objects, was decided not to be a correct description of the individual object which it was intended to identify.

What is meant by a correct description? Does it mean a description by metes and bounds, and require the particularity demanded in a deed? The word "correct" is not a technical one. Its obvious meaning in a statute is, such description which identifies the individual object intended to be designated. Such object is accomplished in this case; the subject on which a lien is sought are "the works known as the South Fork Canal, near Placerville, in El Dorado County." If there was no object in existence at the time which answered to that

description, the rule, "*de non apparentibus et de non existentibus eadem est ratio*," must apply, and the description must be deemed sufficiently "correct."

The next objection to the validity of the lien is, that the notice, after giving the information that it was intended to hold a lien on the specific work, does not state that the labor was done on, and the materials were furnished to, that work; but "that the same were for the use of the South Fork Company."

The fact that they were so used is not required to be inserted in the notice, nor does it constitute a part of the description of the property.

That is matter of allegation and proof, without which no recovery can be had. To that extent goes the case of *Houghton* v. *Blake*, cited by defendant's counsel.

The last objection to the validity of the lien is, that if it ever existed, it has been lost by failure to bring a suit to enforce the lien within a year from the time the work was done. Now, there is a conflict as to the time when the work was done, and inasmuch as a plea is not, like an answer, deemed evidence, and the matter is one of avoidance, and as such, if embodied in an answer, must have been proved on the final hearing, it must be submitted to proofs on both sides.

After a careful review of this case, the court has come to the conclusion that the plea must be overruled, and it is ordered accordingly.

McDougal & Sharp and Hall McAllister, for complainant.
Crockett & Crittenden, for defendants.

KENDALL, McDONALD & STETSON *v.* BADGER.

Circuit Court, U. S., January Term, 1859.

In an action against a party primarily liable on a promissory note made payable at a particular place, demand for payment at that place need not be averred.

If the maker was ready at the time and place to pay, it is matter of defense.

A discharge of a defendant, a citizen of this State, from a foreign contract is no bar to an action brought against him upon it.

An action was brought in this case by the payees against the maker of a promissory note.

Defense was, that no allegation in complaint was made of presentment for payment at the place named in the note; and, further, that defendant had been discharged under the insolvent law of this State.

Held, That plaintiffs were entitled to judgment.

McAllister, J.—A *demurrer* was filed in this case, and the ground assigned is, that there is no allegation in the complaint that the note sued on was presented for payment at the place at which it is made payable on its face.

The action is brought by the payees against the maker, who is primarily, not secondarily, liable. In such an action, between such parties, a demand for payment need not be averred.

If the maker was ready at the time and place, and offered to pay, it is matter of defense to be pleaded and proved. (*Wallace* v. *McConnell*, 13 Peters, 136; *Brabston* v. *Gibson*, 9 Howard, 279.) The *demurrer* is therefore overruled.

An answer has been filed which pleads in bar of this action the discharge of the defendant on 3d June, 1857, under the insolvent law of this State, approved May 4, 1852. To this answer a *demurrer* has been filed.

The note sued on is in the following words:—

"BOSTON, *Jan'y* 1, 1856.

"$1,194 $\frac{44}{100}$. Eight months after date, I promise to pay to the order of Kendall, McDonald & Stetson, eleven hundred and ninety-four $\frac{44}{100}$ dollars, at the office of Andrew Carney, 40 State street, Boston, for value received.

"WM. G. BADGER."

It is in proof that all the payees of said note, at the time of the execution thereof, were citizens of Massachusetts, except one, and he at the time was a citizen of the State of New York; and, further, that defendant, the maker of said note, was at the same time a citizen of the State of California, and has continued such to the present time.

The facts on the face of the note, its date, and the place where it is payable, stamp it as a Massachusetts contract.

In view of these circumstances, the discharge of defendant, under the insolvent act of this State, cannot bar the present action.

In the case of *Byrd* v. *Badger*, decided by this court in its January Term, 1858, this precise question was decided with the authorities given for its enunciation.

It is useless to repeat them.

The *demurrer* to the answer must be sustained.

Halleck, Peachy & Billings, and Gregory Yale, for plaintiffs.

Hall McAllister, for defendant.

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